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NO. OCTOBER TERM, 1980

IN THE

Supreme Court of the United States

EASTERN ASSOCIATED COAL CORP.,
Plaintiff-Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO., LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,
Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

In a diversity case applying state law, must a Court of Appeals that is duty bound to fairly apply state law reconsider and reverse its prior decision reversing the District Court where an intervening decision of the state appellate court having general appellate jurisdiction cites the District Court's decision under appeal as applying the correct principles of state law and, further, follows and applies those principles, leaving no doubt that the District Court correctly perceived and applied the applicable law?

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The Petitioner prays that a Writ of Certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit entered October 23, 1980.

OPINIONS BELOW

The Opinion of the Court of Appeals, reported at 632 F.2d 1068 (3d Cir. 1980), appears in the Appendix hereto (App. A, *infra*). The Opinion rendered by the United States District Court reported at 475 F. Supp. 586 (W.D. Pa. 1979), appears in the Appendix hereto (App. B, *infra*).

JURISDICTION

The decision of the Court of Appeals for the Third Circuit was entered on September 23, 1980. A petition for rehearing was denied by the Court of Appeals for the Third Circuit in an Order entered on October 17, 1980 and a judgment issued in lieu of a mandate was entered on October 23, 1980. An extension of time within which to file a petition for a writ of *certiorari* was granted by this Honorable Court in an Order entered on January 5, 1981. Motions for leave to file petitions out of time and for leave to file petition with excess pagination were granted only for panel rehearing by Order entered on February 24, 1981. Petitions to the Court of Appeals for the Third Circuit for Reconsideration and to Recall the Mandate were denied by that Court by Orders entered on March 6, 1981. The foregoing orders appear in the Appendix hereto (App. C, *infra.*). This Court's jurisdiction is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

28 U.S.C. §1652, The Rules of Decision Act:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This is a diversity case applying the insurance law of the Commonwealth of Pennsylvania in an insurance policy dispute between plaintiff-petitioner Eastern Associated Coal Corp. ("Eastern")[1] and defendant-respondent insurers ("Insurers") for loss of profits and expenses for the interruption of business.

Following a successful trial by jury in the District Court, but an adverse decision by the Court of Appeals as to most of Eastern's claims and denial of a motion for rehearing, Eastern discovered that four days prior to the adverse decision of the Court of Appeals, the Pennsylvania Superior Court had cited the District Court decision in favor of Eastern for the Pennsylvania law applicable to such insurance policy disputes and applied and followed that decision in resolving a dispute pending before the Pennsylvania Superior Court. Under these unusual circumstances, Eastern sought to have the Court of Appeals recall its' mandate to the District Court, to grant a rehearing *en banc* and to correct the mistake and reverse its decision, but the panel which had decided the matter adverse to Eastern denied as untimely Eastern's petition seeking rehearing *en banc*, refused to recall the mandate and, further, without comment, denied Eastern's petition.

Eastern commenced this action pursuant to 28 U.S.C. §1332 to recover for its loss sustained as a result of a business interruption caused by fire to certain coal mining operations insured by the 13 Insurers. After extensive pretrial procedures and a two-week trial, a jury awarded Eastern the sum of $4,736,377. The case was decided under Pennsylvania law. Post-trial motions were filed by the Insurers and Eastern and, finally, the District Court entered judgment for Eastern in the lesser sum of $3,845,633. The District Court remitted the

[1]Eastern's parent company is Eastern Gas and Fuel Associates and all subsidiaries of Eastern are wholly owned.

award for the reason it concluded part of the award was based upon speculation. The Insurers and Eastern appealed.

Eastern's appeal concerned whether the District Court erred in a post-trial reduction of the jury's award by $890,744. The Insurers' appeal concerned whether certain other items making up the award were covered by the policy.

On May 19, 1980 counsel for the parties presented oral argument to a panel of Three Judges of the Court of Appeals for the Third Circuit (Van Dusen, Adams and Higgenbotham) and the panel took the matter under advisement. (Unbeknown to Eastern a similar insurance dispute was on appeal from a state trial court and pending before the Pennsylvania Superior Court in a case entitled *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 422 A.2d 1978 (Pa. Super. 1980), which opinion appears in the Appendix hereto (App. D, *infra*). On September 23, 1980, the Court of Appeals rendered its decision. The court affirmed in part and reversed in part the District Court's decision. In reversing, the Court of Appeals rejected the District Court's application of the law of Pennsylvania and Eastern's argument that the District Court had correctly applied Pennsylvania law. The result deprived Eastern of $3,558,356. The Court of Appeals made no reference to the *Berkeley Inn* decision.

By way of background, Eastern, a West Virginia corporation with offices in Pittsburgh, Pennsylvania, operates a number of underground soft coal mines in Pennsylvania and West Virginia.

During the night of January 14, 1974, a fire broke out in Eastern's Joanne Mine, located near Rachel, West Virginia. Following various emergency procedures, representatives of the State of West Virginia Department of Mines, United States Bureau of Mines, the United Mine Workers of America and Eastern decided to evacuate all personnel and seal the mine.

To protect itself against just such adverse consequences and business losses, Eastern, years earlier, had purchased insurance including that commonly referred to as "business interruption insurance." At the time of the fire, Eastern's total insurance package consisted of four separate and identical joint policies of insurance issued September 14, 1972 extending to September 14, 1975, which insured both damage to and destruction of property and loss of earnings from business interruption. The latter coverage, however, extended for a maximum of 12 months and it is this coverage which is central to the dispute. During the course of events following the fire and mine closing, a coverage problem developed with the present respondent-insurers who resisted and finally denied coverage as to certain elements of Eastern's loss.

On July 11, 1975, Eastern filed its suit to have its business interruption loss determined and demanded trial by jury.

At trial, Eastern presented detailed evidence of the mining operations including production costs; the fire and recovery effort; the industry market conditions; a contract dispute with Sharon Steel Corporation and an arbitrators' award made in that dispute. Finally, Eastern focused on three elements for the jury to consider in making its judgment:

Brokerage Coal	$2,175,240
Joanne Coal	1,178,021
Substitute Coal	1,599,461
	$4,952,722

A separate claim for prejudgment interest was reserved for post-trial consideration by the District Court. Applying the insurance law of Pennsylvania, the District Court submitted Eastern's loss of profits and expenses to the jury.

After being instructed by the District Court, the jury returned an award in favor of Eastern and against the Insurers in the sum of $4,736,377 or, $216,345 less than Eastern had suggested as its loss of profit and expenses.

Based upon the award, plaintiff then moved, post-trial, for an award for prejudgment interest and the Insurers moved for judgment notwithstanding the verdict or a new trial and renewed the "no-coverage" argument. Also, the Insurers argued that as to the item of Eastern's loss for Joanne coal, to-wit, for $1,178,021, the award was based on speculation. On August 22, 1979, the District Court ruled on all issues. The Court awarded plaintiff prejudgment interest in the sum of $846,039.26, but reduced the jury award by $890,744 based on the Insurers' argument as to the Joanne Coal item of Eastern's loss. The District Court denied defendants' other arguments.

PROCEEDINGS BELOW

When the panel of the Court of Appeals considered and reversed the judgment of the District Court in favor of Eastern, it did so because of various points of disagreement as to the applicable Pennsylvania law, but namely that Eastern's insurance policy was not to be construed against the insurance companies (A-14) as the District Court held (B-7), and that Eastern's loss of profits and expenses was improperly submitted to the jury by the District Court. (A-22).[2]

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[2]The Court of Appeals affirmed the holding of the District Court that the jury's award in favor of Eastern for the item identified as "Joanne Coal" was speculative (A-25). The District Court's decision stated only its conclusion without reference to any supporting facts (B-12). In attempting to justify the result reached by the District Court, the Court of Appeals undertook its own analysis of the evidence and from that concluded that Eastern had failed to sustain its burden of proof with regard to the sulfur content of certain coal to be delivered to Eastern's customer, Sharon Steel (A-8 - A-11).

Eastern believes the analysis of the Court of Appeals was and is clearly erroneous because it assumed that all sulfur in coal is the same, but which is not the case. In coal technology, sulfur can occur in three different forms, but only two are of concern. As to those two, there is a distinct difference between them. The term "sulfur" is used loosely without reference to the specific sulfur intended. Coal is organic matter which may have organic sulfur within the coal. Organic sulfur is locked in the molecules of the coal itself and is

(continued)

As to the first point, the panel's holding is without precedent in Pennsylvania law. For years, the law of Pennsylvania has been to the contrary. *See W. & A. Pipe Lines v. Insurance Co.*, 145 Pa. 346, 22 A. 665 (1891). Appropo, the Pennsylvania approach favoring policyholders, in *Brakeman v. Potomac Insurance Co.*, 472 Pa. 66, 72, 371 A.2d 193 (1977), the court stated:

> "The rationale underlying the strict contractual approach reflected in our past decisions is that courts should not presume to interfere with the freedom of private contracts and redraft insurance policy provisions where the intent of the parties is expressed by clear and unambiguous language. We are of the opinion, however, that this argument, based on the view that insurance policies are private contracts in the traditional sense, is no longer persuasive. Such a position fails to recognize the true nature of the relationship between insurance com-

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combustible. The extent of its presence is determined by chemical analysis. Inorganic sulfur is non-combustible matter also referred to as "pyritic sulfur or iron pyrites" (fool's gold) and is physically separable from coal by mechanical means if it is found as an impurity within the coal seam in its natural state. This sulfur is refuse and similar to other impurities found in natural coal seams such as clay, slate or rock. Inorganic sulfur, like other refuse, may be separated from coal by a method called "coal washing" in which the coal is separated from refuse by reason of the differing specific gravities of the coal and refuse materials when placed in water. Organic sulfur is not affected by coal washing.

The Court of Appeals in referring to testimony concerning sulfur removed by washing (A-10 - A-11) confused *in*organic sulfur with organic sulfur. Possible removal of inorganic sulfur to which the Court of Appeals refers simply does not affect the chemical analysis for organic sulfur in the coal for Sharon Steel. Because of the Court of Appeals' erroneous assumption and mistaken belief as to basic coal technology, the Court of Appeals fell into further error in attempting to uphold the District Court's unsupported conclusion that the jury award was speculative. The jury accepted the testimony of a professional mining engineer. While Eastern is aggrieved by the panel's analysis of this claim, Eastern recognizes the difficulty in seeking review by this Court on that ground; hence, without waiving the merits the matter is not further discussed herein.

> panies and their insureds. An insurance contract is not a negotiated agreement; rather its conditions are by and large dictated by the insurance company to the insured."

The court went on to overrule long standing case law holding in favor of insurance companies requiring policyholders to give prompt notice of claims as set forth specifically in policies as a condition precedent to protection from liability claims made by third persons.

Here, the rationale for the panel's departure from a fundamental principle of Pennsylvania insurance law (A-14) appears to be based upon a reporter's headnote extrapolating from *dicta* in the case of *Eastcoast Equipment Co. v. Maryland Cas. Co.*, 38 D&C 2d 499, 511-12, (Pa. C.P. 1965), *aff'd per curiam on opinion below*, 207 Pa. Super. 383, 218 A.2d 91 (1966). The headnote refers to the decision of a state trial court as follows:

> "[9] Principle that ambiguities in policies should be strictly construed against insurer need not be strictly adhered to in instances where one large corporation and one large insurance company both advised by competent counsel do business with each other." 218 A.2d at 91.

Actually, what the trial court said was:

> "There would be little purpose in hewing to legal platitudes with no application where one large corporation and one large insurance company, both advised by competent *legal counsel*, do business with each other." 218 A.2d at 98. (Emphasis supplied.)

The trial court, however, did not cite any authority for the statement and did not rely upon that statement in reaching its decision and, further, the trial court finally qualified the statement by adding, at 98:

> "This is not to say that the interpretation of insurance policies should vary according to the sophistication of the purchaser,. . . ."

Extrapolating from the erroneous headnote reference to *dicta*, the Court of Appeals concluded that because Eastern's insurance broker rather than the 13 Insurers physically assembled the policy for the Insurers to execute and deliver to Eastern, the insurance companies should be excused from application of one of the most basic principles of Pennsylvania insurance law even though the policy consisted of nothing more than standard terms originated and used by insurance companies.

The Court of Appeals refused to take notice that practices at Lloyd's require that the broker who arranges for a policy must physically prepare and assemble same, although in fact, Lloyd's underwriters first issue written acknowledgment of the contract and its terms. For a comprehensive review of practices at Lloyd's, *see Edinburgh Assur. Co. v. R. L. Burns Corp.*, 479 F. Supp. 138, 144 (D.C. C.D. Cal. 1979).

Whether physical preparation of a standard insurance policy by a broker rather than the insurance company gives rise to an exception to basic Pennsylvania law construing the policy against the insurance company has not been decided in Pennsylvania, but in *Wheeler et al v. Aetna Ins. Co.*, 4 F. Supp. 820 at 823 (E.D. N.Y. 1933), *reversed on other grounds* 68 F.2d 30 (2d Cir. 1933), applying the law of New York, a result opposite to that reached here was indicated:

> "[5] It is not of moment that the indorsements in question may have been prepared by the broker of the libelants [insured], as they were accepted by the respondent [insurance company] and must be construed more strongly against it. *Bushey & Sons v. American Ins. Co.*, 237 N.Y. 24, 142 N.E. 340."

Thus, in at least one jurisdiction where the issue has been raised, the court concluded that the mere fact that the person who physically prepares a policy is someone other than an employee of the insurance company does not except application of the basic principle. And, there is no logical reason why

Pennsylvania would make an exception to its policy of adopting the view most favorable to the consumer but, instead, adopt a rule favorable to insurance companies. Obviously, where standard insurance terminology is to be interpreted, it would be injudicious for a court to apply a principle that varies depending on the size of the purchaser—however "size" might be defined—but apparently that is what the Court of Appeals panel perceives Pennsylvania appellate courts would hold!

As to the second major point of disagreement with the District Court, to-wit, that the issue of Eastern's loss of profits and expenses was improperly submitted to the jury, the District Court relied upon the case of *Nusbaum v. Hartford Fire Insurance Co.*, 285 Pa. 332, 132 A.177 (1926). The District Court stated:

"It should be noted that while generally the construction of an insurance policy is for the court, nevertheless, where there are words similar to those involved in this policy, the matter should be left to the jury. *Nusbaum v. Hartford Fire Ins. Co.*, supra, where the court said:

> 'As to the contention that plaintiff's loss of profits was caused by the increased cost of production and the decrease in selling price and not by fire, it is sufficient to say that the argument made in support of it has not convinced us that this question was not properly left by the court to the jury.'

See also *Heller v. Royal Ins. Co.*, 177 Pa. 262, 35 A. 726 and holding of the Judicial Committee of the Privy Council in *Mt. Royal Assurance Co. v. Cameron Lumber Co. Ltd.*, British Appeals cases 1934, p. 313." (B-8, B-9)

Nusbaum was twice before the Supreme Court of Pennsylvania. In the first instance, 276 Pa. 526, 120 A. 481 (1923), the Pennsylvania Supreme Court reversed a jury verdict awarding damages to the policyholder because the verdict

included a double recovery for the same elements of loss. On retrial, the jury again awarded damages to the policyholder (this time, a greater amount) and the insurer again appealed. 285 Pa. 332, 132 A. 177 (1926). Appellant insurance company took exception to the submission of the issue to the jury and contended, *inter alia*:

"STATEMENT OF QUESTIONS INVOLVED

* * *

6. Whether it is proper for a trial judge to leave it to the jury to choose one of a number of different measures of damage?

* * *

The amount of profits recoverable under the policy depended on the construction of the policy itself and not upon any disputed questions of fact and the policy being a writing, its construction was, therefore, a question of law for the Court. That the construction of a written instrument is a question for the Court is such a well-settled principle of law that only the most recent decisions reciting and applying this principle need be cited. In *Baldwin vs. Magen,* 279 Pa. 302, this Court, after quoting the general rule from 2 *Williston on Contracts,* Section 616, page 1193, said (at p. 306):

> 'Where all of the agreement or understanding between the parties is before the Court in writing and it is unnecessary for any reason to resort to evidence dehors the written contract, the Court must construe the contract and not leave it to the jury for interpretation.'"

(Appellant's Brief, at page 23.)

However, the Pennsylvania Supreme Court rejected appellant's argument and stated:

> "Appellant's final complaint is that the court gave the jury no definite rule by which to measure the damages sustained. On this feature of the case, it calls to our attention decisions such as Otis Elevator Co. v. Flanders Realty Co., 244 Pa. 186, and Shimer v. Penn Electric Smelting Corporation, 273 Pa. 467, the criticism being that the trial judge permitted the jury to adopt a measure of damages of its own without guidance in the instructions. After reading the entire charge on the subject of damages, we think this criticism not warranted. The court charged as to the measure of damages contended for by plaintiff and that contended for by defendant and also submitted a measure of its own based on figures to be found in the testimony. What the court evidently meant when it said the jury could adopt any system of calculation which commended itself to their good judgment was that they could adopt any of the systems of calculation which he had submitted to them; that this was the understanding of counsel at the time is borne out by the fact that the able advocate who tried the case of defendant in the court below, now elevated to the Bench, quite evidently did not construe the court's language as it is now contended it should be construed, as the wording of his exception indicates."

Here, the reversal of the District Court was not based upon application of a single Pennsylvania appellate court decision distinguishing *Nusbaum* and, further, *four days prior to the panel's decision*, the Pennsylvania Superior Court put its stamp of approval on the District Court's analysis of Pennsylvania law in the instant case by citing that very decision. Further, the Superior Court then followed and applied the District Court's decision. In particular, the Superior Court followed the holding of the District Court that conflicting views of experts and other witnesses as to the recoverable loss

of profits and expenses of a business are for the finder of fact to resolve under the broad general principle that business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened.

It goes without saying that the Pennsylvania Superior Court was not required to look to, cite or follow the District Court's analysis of the law of Pennsylvania and that the Pennsylvania Superior Court did so surely must compel the conclusion that the District Court's decision properly set forth the applicable Pennsylvania law. In fact, that the Pennsylvania Superior Court even cited the District Court decision can only be viewed as a distinct compliment to the District Court's perception of the law of Pennsylvania and should be controlling here.

Not only did the Pennsylvania Superior Court cite the decision of the District Court, but the Superior Court also cited the case of *Supermarkets Operating Co. v. Arkwright Mutual Insurance Co.*, 257 F. Supp. 273 (E.D. Pa. 1966), which both Eastern and the District Court relied upon throughout the history of this case. In *Supermarkets, supra,* the District Court in applying Pennsylvania law to language in a business interruption policy issued by an insurance company held that the meaning of the terms "necessarily continuing expenses" was unclear and the coverage ambiguous because it was prefaced with the words, "Actual Loss Sustained". Following trial, the District Court found in favor of the policyholder and eventually the insurance company settled. Here, the Court of Appeals gave no meaning to the words insuring Eastern for its "Actual Loss Sustained" and failed to follow the *Supermarkets* case.

The policy language in *Supermarkets, supra,* and *Berkeley Inn, supra,* was and is essentially the same as here. In *Berkeley Inn, supra,* the recoverable loss of profits and

expenses was in dispute. Both parties advanced their theories through the testimony of expert witnesses and other evidence. *Berkeley Inn* followed the District Court in *Eastern* and *Berkeley Inn* is consistent with *Nusbaum II*, but the Court of Appeals decision is inconsistent with both decisions as well as *Supermarkets, supra.*

An analysis of both *Nusbaum* and *Berkeley Inn* compels at least four conclusions as to the law of Pennsylvania: (1) Under Pennsylvania law, a broad interpretation is given to a policy insuring for loss of profits and expenses to accomplish the general intent that a policyholder recover his actual monetary loss from the interruption of his business; (2) Under Pennsylvania law, the ultimate issue of loss of profits and expenses recoverable from the interruption of business is for the finder of fact to determine based upon the testimony of witnesses and other evidence; (3) Under Pennsylvania law, it is not for courts to perceive themselves as experts in the operations of a business and the analysis of a business interruption loss and to determine whether a particular item of loss or expense claimed by the insured comes under a so-called "formula". Rather, it is for the witnesses to expound upon their theory of loss of profits and expenses from the business interruption and for the finder of fact to determine based upon the general objective of the insurance policy; and (4) When Eastern presented evidence at trial that because of the fire it sustained a loss of profits for substitute coal at mines other than Joanne in the sum of $1,599,461, it was a clear abuse of discretion for the Court of Appeals panel to recognize the substitute coal as lost profits (A-6) and then to reclassify *sua sponte* that loss of profits as a "new expense" (A-20) and exclude it from the policy, as whether Eastern sustained that or any other loss was for the jury.

Berkeley Inn reinforces *Nusbaum II* and leaves no room for a difference of opinion that under Pennsylvania law a court

must submit to the finder of fact under general instructions the determination of the loss of profits and expenses recoverable rather than to put the policyholder at the peril of the business expertise of the court construing and classifying different expenses or losses which a business may experience from a casualty.

In depriving Eastern of the right to have its loss determined by the jury, the Court of Appeals referred to the issue only by way of a footnote without setting forth an analysis of the issue. The Court simply stated in footnote 12 (A-14, A-15):

> "The *Nusbaum* case returned to the Pennsylvania Supreme Court after trial on remand. *Nusbaum v. Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926). In *Nusbaum II* the court found no error in the jury's determination of the cause of the insured's loss or calculation of the insured's damages. Eastern argues that *Nusbaum II* stands for the proposition that 'it is for the jury to determine the measure of damages' (Reply Brief for Appellant-Cross-Appelle at 14). Indeed, *Nusbaum II* permits a jury to determine the value of each element in an insurance policy's formula for recovery. However, the formula for recovery is not a jury question, but a question of law for the judge to determine from the language of the policy."

However, as to the Court of Appeals' conclusion that the issue was not for the jury, in *Nusbaum II*, appellant insurance company argued that very issue and lost! *See* page 10 herein. Moreover, not only did the Court of Appeals fail to follow the holding of *Nusbaum II*, it went on to classify certain language in Eastern's policy as a "formula". Then, by "close examination" and "interpretation" of that formula, the Court concluded that the formula excluded Eastern's elements of loss because the formula did not expressly make reference to "new expenses" as distinguished from simply "expenses" and "continuing expenses" to which the policy applied (A-17—A-20).

The Court of Appeals' rationale and interpretation of the insurance contract is so contrary to basic principles of Pennsylvania insurance law as to shock one's conscience.

Under Pennsylvania law, it is crystal clear that the consumer is entitled to more than a mere guide to interpretation or a revelation upon close analysis of the policy. Rather, any limitation or exclusion to be effective against the policyholder must be simply stated and leave no room for doubt. The burden is on the insurance company to say what it means by plain language and exclusions are not to be fished out of the policy, but must be clear to anyone who reads. *See Sykes v. Nationwide Mutual Insurance Co.* 413 Pa. 640, at 642-644, 198 A.2d 844 (1964).

While Eastern respectfully submits that it was and is fundamental error for the Court of Appeals to reverse the District Court's holding as to the applicable law, the Court of Appeals was bound to follow and fairly apply *Berkeley Inn* when that prior decision was made known to the Court. Due process required that the Court of Appeals recall its mandate and grant a rehearing *en banc* even though no procedural rule applied to the situation. Otherwise, Eastern is compelled to seek relief here when it is well known that from a statistical standpoint Eastern's chances of obtaining a writ are exceedingly poor.

Here, Eastern requests that this Honorable Court grant Eastern's request for a writ of *certiorari* and review the decision of the Court of Appeals on its merits, or at least grant the writ and return the case to the Court of Appeals with directions to rehear Eastern's argument before the Court *En Banc* rather than the original panel. Otherwise, Eastern will be denied due process of law. It is regrettable, but true, that courts simply do not want to admit of mistakes and courts already overburdened with work are not looking for more—but what of due process and justice to the litigants?

REASONS FOR GRANTING THE WRIT

A. A Right to Trial by Jury Should Not Be Lightly Disregarded.

A federal court should not lightly trammel a claimant's right to trial by jury when established by state court decisions. In the trial of this type of claim, Pennsylvania law requires the court to submit the loss of profits and expenses recoverable to the jury for resolution. *Nusbaum v. Hartford Fire Ins. Co., supra.; Berkeley Inn, Inc. v. Centennial Ins. Co., supra.* The finder of fact must consider the testimony of witnesses and other evidence and then determine the losses which are recoverable from the insurer.

B. The Decision in *Berkeley Inn* Was And Is Binding on the Court of Appeals.

In a diversity action, the federal courts are governed by state substantive law pursuant to the Rules of Decision Act, 28 U.S.C. §1652, and the doctrine in *Erie R. Co. v. Tompkins,* 304 U.S. 64, (1938).

In three cases, it has been held that the federal courts are bound by decisions of a state's intermediate appellate court unless there is persuasive evidence that the highest state court would rule otherwise. *Six Companies v. Joint Highway Dist. No. 13,* 311 U.S. 180 (1940) *rehearing denied,* 311 U.S. 730 (1940); *West v. American Telephone & Telegraph Co.,* 311 U.S. 223 (1940); *Stoner v. New York Life Ins. Co.,* 311 U.S. 464 (1940) *rehearing denied,* 312 U.S. 713 (1941). In *West, supra* at 237, this Court clearly established the standard when it held:

> "...an intermediate appellate state court...is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

Reliance on the Pennsylvania Superior Court was specifically approved in *New York Life Ins. Co. v. Ruhlin,* 25 F. Supp. 65 (W.D.Pa. 1938) *aff'd.* 106 F.2d 921 (3d Cir. 1939), *cert. denied* 309 U.S. 665 (1940), *rehearing denied,* 309 U.S. 695 (1940).

Due to a rule change in the Pennsylvania Rules of Appellate Procedure prior to *Berkeley Inn*, the Superior Court of Pennsylvania enjoys a substantially increased authority and responsibility for determining the law of the Commonwealth of Pennsylvania. Rule 1114 of the Pennsylvania Rules of Appellate Procedures (which became effective December 30, 1978) provides:

> "Except as prescribed in Rule 1101 (appeals as of right from the Commonwealth Court), review of a final order of the Superior Court or the Commonwealth Court is not a matter of right, but of sound judicial discretion, and an appeal will be allowed only when there are special and important reasons therefor."

In effect, the Superior Court is no longer a true intermediate appellate court, but generally is the final judicial authority in Pennsylvania. Thus, the federal courts are bound to follow its decisions on matters of substantive Pennsylvania law.

As established in *Vandenbank v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), a Court of Appeals must apply state law as of the time when it disposes of the appeal, not as of the time when the judgment below was entered. In *Vandenbank* the trial court dismissed an action alleging contraction of various occupational diseases including silicosis through the negligence of defendants because under the law of Ohio no recovery was permitted for that type of occupational disease. Subsequently, the Ohio Supreme Court reversed its former decisions and declared occupational diseases, such as that about which plaintiff complained, were compensable under

Ohio common law. The Supreme Court, in reversing the Circuit Court of Appeals affirmance of the trial court, stated:

> "While not insensible to possible complications, we are of the view that, until such times as a case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court. Any other conclusion would but perpetuate the confusion and injustices arising from inconsistent federal and state interpretations of state law." (Footnotes omitted) 311 U.S. at 543.

Where, as here, an intervening state appellate court decision has been issued on the question presented, the Court of Appeals should reconsider its decision which is *contra* to that decision. Reconsideration has been approved in circumstances such as those here involved. In *American Nat. Ins. Co. v. Belch*, 100 F.2d 48 (4th Cir. 1938) the Court of Appeals reversed the trial court noting that no statute or decision of the state had been found bearing on the question. Thereafter, plaintiff's counsel discovered a state court decision and, upon rehearing, the Court of Appeals withdrew its earlier opinion and affirmed the trial court.

In *Maryland Casualty Company v. Hallatt*, 326 F.2d 275 (4th Cir. 1964) *cert. denied*, 377 U.S. 932 (1964), the Court of Appeals reversed and remanded a judgment for plaintiff for retrial which resulted in a verdict and judgment in favor of defendant. Subsequent to the retrial and before an appeal therefrom, the Florida Appellate Court for the Third District rendered a decision rejecting the majority opinion in the Court of Appeals and adopting the dissenting opinion therein (which dissent agreed with the trial court). Thereafter, the Court of Appeals corrected its initial opinion and affirmed the trial court's judgment involved in the first appeal.

While the circumstances in this case are unusual, they are not without precedent. In *National Surety Corp. v. Midland Bank*, 551 F.2d 21 (3d Cir. 1977), the District Court denied relief to plaintiff based upon its construction of a New Jersey statute which had not previously been construed by the New Jersey courts. Subsequent to the District Court's decision, an intermediate appellate court in New Jersey expressed approval of the District Court's construction. The Court of Appeals found that it was not constrained to follow the New Jersey decision because the New Jersey court, by its own holding, vitiated the need for it to construe the statutory provision thereby rendering such approval as *dictum* which the Court of Appeals found to have no basis in New Jersey law. The Court of Appeals found that the New Jersey decision relied solely on the District Court decision which it found to be defective.

While the *National Surety* case differs in some respects from the instant case, it illustrates the respect for state court decisions and the duty to consider such decisions in rendering a just and proper decision in a diversity case.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 79-2397 and 79-2398

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

v.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; HOME INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO. LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.
Appellants in No. 79-2398

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 75-0855)

Argued May 19, 1980

Before ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

(Opinion filed September 23, 1980)

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OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

This diversity case involves cross-appeals from a partial grant of the defendants' motion for judgment notwithstanding the verdict. The jury awarded Eastern Associated Coal Corporation (Eastern) $4,736,377. under a business interruption insurance policy held with the defendant insurers for losses incurred due to the closing of Eastern's Joanne Mine after an underground fire. The defendants moved for judgment n.o.v. on two grounds. First, the defendants' motion argued that there was insufficient evidence to support the plaintiff's theory concerning the sales value of a portion of the coal which would have been mined by Eastern during the interruption covered by the policy. The trial judge granted this portion of the motion and reduced the jury's award by

$890,744. Eastern appeals from this action. Second, the defendants' motion argued that the insurance policy did not cover any expenses incurred by Eastern in obtaining alternative coal to fulfill its contractual obligation to supply metallurgical coal from the Joanne Mine to Sharon Steel Corporation. The trial court denied this portion of the motion and entered judgment for $3,845,633. We affirm the trial court's grant of judgment n.o.v. with regard to the first portion of the motion and reverse the trial court's denial of judgment n.o.v. with regard to the second portion of the motion. The case will be remanded for entry of judgment against the defendant insurers in the amount of $287,277.

I.

Eastern, a West Virgina corporation with offices in Pittsburgh, Pennsylvania, operates a number of underground soft coal mines in Pennsylvania and West Virginia. In 1969, Eastern purchased the Joanne Mine, located near Rachel, West Virginia, from Sharon Steel Corporation. Some of the coal in the mine was metallurgical coal; the balance was classified as steam coal. Sulphur content is the distinguishing factor between the classifications. Metallurgical coal has a low sulphur content, and accordingly burns at high temperatures. It is required in the production of steel. Steam coal has a higher sulphur content, burns at lower temperatures, and is not suited to use in steel production. The purchase agreement with Sharon provided in part for a coal supply contract, under which Eastern agreed to furnish the metallurgical coal requirements of Sharon's Fairmont Coke Works, estimated at 250,000 tons annually, for a ten-year period. The contract contained base prices for coal and an escalator clause to cover increases in the cost of production. It also provided that the coal supplied would come from the Joanne Mine until its metallurgical

coal reserves were exhausted. As the seam was estimated to contain 1,125,000 tons of metallurgical coal, the Joanne Mine was expected to supply Sharon for approximately four and one-half years. After exhaustion of the Joanne metallurgical area, Eastern was obligated under the contract to obtain metallurgical coal from other sources for the remainder of the term of the contract. The contract also contained a provision which required all metallurgical coal to have a sulphur content of less than 1.6%.[1] Sharon could reject any coal which did not comply with this specification.

In 1972 Eastern bought the business interruption insurance policy under which it is currently suing. The policy was part of a four-policy package which covered all of Eastern's mines in Pennsylvania and West Virginia for business interruption insurance. Eastern's protection under the total package was $20,000,000. Each layer insured $5,000,000. The first policy covered losses up to $5,000,000. sustained from the closing of any mine. The second policy covered losses from $5,000,000. to $10,000,000., the third up to $15,000,000., and the fourth up to $20,000,000. These policies were produced by Eastern's insurance broker, Marsh & McLennan, Inc., which selected the form, prepared the policies, and sent the policies to the insurers and underwriters for signature. Several insurers helped to underwrite each policy.

On January 14, 1974, a fire broke out as the result of an underground accident involving the derailment of a mine locomotive in the metallurgical section of the Joanne Mine. Within 24 hours the mine was totally

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1. The sulphur content requirement was actually somewhat more stringent and complicated. However, for simplicity Eastern conceded at trial that only coal exceeding 1.6% sulphur content would be deemed to be non-complying, and that all coal having 1.6% sulphur content or less would be deemed to comply. Revised Brief for Plaintiff-Appellant at 19.

sealed as a means of extinguishing the fire by depriving it of oxygen. This fire, however, terminated all mining operations for a 12-month period, which was the term of coverage under the policy.

During the year after the closing, Eastern's coal production at the mine was essentially zero. However, it was estimated that Eastern could have mined approximatly 181,000 tons of metallurgical coal and 434,000 tons of steam coal during the year of coverage, if there had been no interruption. In determining recovery under the policy, the value of this lost production to Eastern is an important factor. The recovery increases directly in proportion to the value of lost production.

There is no dispute concerning the value of the lost steam coal production. There is a dispute, however, concerning the value of the lost metallurgical coal production. The parties agreed at trial that value was to be determined by the contract price for coal which would be sold under contract and by market price for coal which would be sold on the open market. The dispute here concerns how much coal would be sold on the market. The insurers believe that all of the metallurgical coal would have been sold to Sharon under the contract. If this is the case, it is agreed that the total recovery under the policies for lost production would be $5,287,277.[2] Eastern, however, asserts that 77,000 of the 181,000 tons of lost metallurgical coal production would have been rejected by Sharon because they would have had a sulphur content in excess of the 1.6% requirement of the contract. Eastern, accordingly, asserts that the 77,000 tons would have been sold on the open market and

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2. The district court found that the defendant insurers admitted liability in the amount of $287,277. in its brief filed in support of its motion for judgment notwithstanding the verdict (160a). The insurers have pointed to no written documentation controverting such admission at the post-trial stage of the district court proceedings.

should be valued at the higher market price. The increased revenues which would have been obtained from selling such coal on the open market are claimed to be $890,744.[3] Accordingly, Eastern asserts that its recovery should be at least $6,178,021. — the total of $5,287,277. plus $890,744. The insurers dispute recovery of the additional $890,744. This is the first issue we must resolve.

Eastern makes an additional claim under the policy. Eastern claims that the policy covered the expenses Eastern incurred in obtaining alternative coal to fulfill its contractual obligation to supply metallurgical coal from the Joanne Mine to Sharon Steel. After the fire, Eastern contended that due to a *force majeure* clause in its contract with Sharon, it was relieved of its obligation to supply Sharon with metallurgical coal. Sharon disagreed, and the dispute was brought to arbitration. The arbiter held that Eastern's obligation to Sharon continued despite the fire, and Eastern was accordingly forced to continue supplying Sharon with metallurgical coal.

This arbitration award exposed Eastern to a substantial new expense. Due to the oil embargo in 1973, the price of coal began to rise steadily. However, during the year of interruption the escalator clause in the contract with Sharon did not keep pace with the increase in market price. Under the contract with Sharon, Eastern was being paid $13.00 to $18.00 a ton for metallurgical coal, while the market price ranged from $50.00 to $75.00. During the interruption, Eastern obtained much of the coal for Sharon from its other mines. Such coal has been denominated "substitute coal." In selling the substitute coal to Sharon, Eastern was deprived of the profit it could have made by selling such coal on the market. Eastern calculated its loss during the year on substitute coal to be $1,599,461. Eastern met the re-

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3. $890,744. does not represent the market price of 77,000 tons of metallurgical coal. It represents the amount by which the market price exceeds the contract price of the 77,000 tons.

maining requirements under the Sharon contract by buying coal on the open market and reselling it to Sharon at the lower contract price. Coal bought on the market has been denominated "brokerage coal," and Eastern calculated its loss on brokerage coal to be $2,175,240. Totaled, Eastern determined its loss on its contract with Sharon to be $3,774,701, thus bringing the full liability claimed against the insurers to $9,952,722.[4] The insurers disputed Eastern's right to recover any money for the expense incurred in complying with Sharon's contract. This presents the second issue we must resolve.

In this case the insurers conceded recovery of $5,287,277. The first layer insurers made full payment under their policy. Therefore, the present suit concerns only the amount in excess of $5,000,000, which is $4,952,722. It is brought solely against the second layer of insurers, who have made no payments to date.

The trial judge denied the defendant insurers' motions for summary judgment and a directed verdict and submitted both issues to a jury. The jury returned a verdict against the insurers in the amount of $4,736,377, which is $216,345 less than the total demanded by Eastern. Post-trial motions for judgment n.o.v. were filed by the insurers. The trial judge granted judgment n.o.v. against Eastern on the first issue. He found the evidence supporting this claim to be speculative[5] and reduced the recovery by $890,744.[6] The judge denied the motion on the second issue and entered judgment against the de-

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4. Eastern arrived at this figure by adding $3,774,701. to the $6,178,021. claimed under the first issue outlined in the text.

5. 168a.

6. As the jury verdict was $216,345. less than the amount demanded by Eastern, it is not clear that the jury awarded Eastern all $890,744. demanded on its first claim. It is clear, however, that the jury awarded at least $674,399. on this claim.

fendant insurers for $3,845,633. The parties appeal from the grant and denial of judgment n.o.v., respectively.

II.

Eastern's appeal is from the trial judge's grant of judgment n.o.v. in the amount of $890,744. In reviewing the district court's order, we are guided by the substantive law of Pennsylvania.[7] Eastern attempted to show that 77,000 tons of metallurgical coal would have been rejected by Sharon and sold on the open market due to its high sulphur content. To this end, Eastern demonstrated that Sharon had the right to reject coal delivered with a sulphur content exceeding 1.6%, and that Sharon had in fact exercised that right on at least one occasion prior to the fire. Eastern also presented a letter from Sharon Steel Corporation authorizing Eastern to sell any rejected coal on the open market. Eastern, further, submitted evidence of the sulphur content of the coal remaining in the metallurgical portion of the mine at the time of the fire. This data had been obtained by analyzing bore samples of coal from the metallurgical section of the mine. Plaintiff argued that this data showed that approximately 77,000 tons of metallurgical coal in the mine had a sulphur content ranging from 1.6% to 2.0%.

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7. The district court applied the substantive law of Pennsylvania in this case. Because the parties do not contest the choice of Pennsylvania law, and because Pennsylvania has both substantial interest in and close contact with the transactions at issue, we have no occasion to address the district court's decision in this regard. Accordingly, our consideration of the substantive questions presented by these appeals will be guided by the law of Pennsylvania. *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, Nos. 79-1433/34, slip op. at 8 (3d Cir., filed July 9, 1980); *Steaks Unlimited v. Deaner*, No. 79-1716, slip op. at 8-9 (3d Cir., filed Apr. 24, 1980); *Pierce v. Capital Communications, Inc.*, 576 F.2d 495, 502 n. 19 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978).

The insurers do not challenge these facts. However, they assert that proof of the sulphur content of the coal in the mine is insufficient to prove the sulphur content of the coal at the time of delivery. They note that after removal from the mine and before delivery, the coal is "washed." This washing process reduces the sulphur content of the coal. Under questioning at trial, a representative of Eastern explained the process as follows:

> "Q. By the way, do you know anything about washing coal? Do you know what it is, what it means?
>
> "A. It's the process of taking coal as it comes from the ground, putting it through equipment from which ash and sulphur are removed.
>
> "Q. Washing removes sulphur?
>
> "A. Yes.
>
> "Q. Is coal washed when it comes out of the ground at Joanne or is it just taken out of the ground and shipped off?
>
> "A. No, it's washed.
>
> "Q. It was washed?
>
> "A. Yes.
>
> "Q. To remove ash and sulphur?
>
> "A. Yes."[8]

A representative of Sharon Steel Corporation, called by the insurers, testified to the same effect:

> "Q. . . . Now we're talking about the Joanne Mine and the met section. Between the time that the coal comes out of the mine and it gets to Sharon, is the coal under the contract supposed to be cleaned?
>
> "A. I don't recall if it specifically says washed. I know all the coal—

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8. 362a.

"Q. I used the wrong expression. Washed.

"A. It does not specifically call[,] what I can read here[,] that it must be washed.

"Q. Was it washed?

"A. To my knowledge, it was washed, yes.

. . .

"Q. Do you know what washing does to coal?

"A. Generally it reduces the ash and sulphur."[9]

Eastern does not challenge the accuracy of these statements. As it is uncontested that the sulphur content of the coal was altered between mining and shipping, we hold that the evidence of the sulphur content of coal in the mine alone was insufficient for the jury to determine the sulphur content at the time of delivery. Without evidence of the effectiveness of the washing process, the jury could only speculate concerning the sulphur content at the time of delivery. There is no evidence from which the jury could infer the effectiveness of washing.[10] It was Eastern's burden to provide evidence from

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9. 604a-605a. Paragraph 15 of Eastern's contract with Sharon provides that, "During the period from June 18, 1969, to exhaustion of Joanne metallurgical reserves, estimated to be 1,125,000 tons recoverage, *cleaned coal basis* — Seller will supply the high volatile requirements under this Agreement from its Joanne Mine." 745a (emphasis added).

10. We have examined the record on this issue with great care and with the assistance of Eastern's briefs and letter of May 24, 1980, prepared at the request of the court at argument. We note that Eastern's reply brief at 34 states that "there is no evidence to show how washing specifically effects [sic], if at all, the metallurgical coal from the Joanne mine." We believe that, with the exception of the phrase "if at all," this is an accurate statement and supports our conclusion that Eastern has failed to carry its burden on this issue.

However, Eastern elsewhere makes the argument that inferences can be drawn from the evidence at trial that washing is ineffective in reducing sulphur. None of these alleged inferences is supported by the record.

which its claim can be established. *Pennsylvania Co. for Ins. on Lives v. Central Trust & Savings Co.*, 255 Pa. 322, 99 A. 910 (1917); *Mackiw v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co.*, 201 Pa.Super. 626, 638-39, 193 A.2d 745, 751 (1963).[11] As Eastern has not done so, it has failed in its proof on this issue.

This failure of proof is grounds for granting a judgment n.o.v. In considering a motion for judgment n.o.v., the court must view the evidence in the light most favorable to the party who secured the jury verdict. *Firemen's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977); 5A

First, Eastern's letter refers to plaintiff's exhibit 20 (765a-770a). Eastern implies that this exhibit demonstrates the difference in sulphur content of coal before and after washing. In fact, the exhibit merely shows the percentage of sulphur in washed coal, when it has 5% moisture in it, compared to the percentage of sulphur in the identical washed coal, when it has 0% moisture in it. Thus, exhibit 20 is silent with regard to the effectiveness of washing.

Second, Eastern's reply brief, at 35, asserts that because washing is a "mechanical cleaning" process, it is ineffective in reducing sulphur which is measured by a "chemical analysis." There is no logic to this assertion. It is obvious that if a "mechanical cleaning" process reduces the sulphur content, the reduction will be reflected in a later "chemical analysis."

Finally, Eastern argues that because a shipment of coal mined in early January 1974 had a sulphur content of 1.59% after washing, and other coal, which would have been mined at the end of January 1974, had an in-mine sulphur content of 1.64%, it can be inferred that washing is essentially ineffective. Again, Eastern's argument is based on speculation. We are asked to assume, without supporting evidence, that the coal which was washed had an in-mine sulphur content of 1.64%. We can make no such assumption because it was undisputed that the concentration of sulphur in the coal varied throughout the mine.

11. Pennsylvania law governs the parties' burden of proof in this case. *Firemen's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1174 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

Moore's Federal Practice ¶5.07[2]. However, a jury verdict may not stand if it is based on mere speculation. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Columbia Metal Culvert Co. v. Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 25 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *Morris Bros. Lumber Co. v. Eakin*, 262 F.2d 259, 263 (3d Cir. 1950). Since the jury in this case could only speculate as to the effect of washing and the amount of coal that would have a sulphur content exceeding 1.6% at the time of delivery, it could only speculate as to how much coal would have been rejected by Sharon and been sold on the open market. The jury may not be permitted to do this. Accordingly, we will affirm the district court's grant of judgment n.o.v. on this issue. This limits Eastern to a recovery under the policy calculated on the value of its lost production of metallurgical coal measured by the contract price of such coal.

III.

The insurers appeal from the district court's entry of judgment on the second issue. They argue that the insurance policy is unambiguous and makes no provision for recovery of new expenses which an insured may incur due to an interruption. Accordingly, they argue that as a matter of law Eastern's loss incurred in selling substitute and brokerage coal to Sharon under the contract is not insured under the policy. Eastern, however, argues that the policy is ambiguous, and that the language should be construed to afford recovery. Eastern contends that recovery is assured under two separate provisions in the policy. The district court charged the jury in accordance with Eastern's theories. To determine whether this was error, we must analyze the policy.

The rules relating to the analysis of insurance policies in Pennsylvania are well established. Since the policy is a contract, the court's duty is to ascertain the intent

of the parties as manifested in the language of the agreement. *Mohn v. American Cas. Co. of Reading*, 458 Pa. 576, 326 A.2d 346 (1974); *Lovering v. Erie Indemn. Co.*, 412 Pa. 551, 195 A.2d 365 (1963); *Treasure Craft Jewelers, Inc. v. Jefferson Ins. Co.*, 583 F.2d 650, 652 (3d Cir. 1978). The court should read policy provisions so as to avoid ambiguities, if the plain language of the contract permits. *Pennsylvania Manufacturers' Association Ins. Co. v. Aetna Casualty & Sur. Ins. Co.*, 426 Pa. 453, 457, 233 A.2d 548, 551 (1967); *Kattelman v. National Union Fire Ins. Co.*, 415 Pa. 61, 64, 202 A.2d 66, 67 (1964). A court should not torture the language of the policy in order to create ambiguities, *Urian v. Scranton Life Ins. Co.*, 310 Pa. 144, 165 A. 21 (1933). If the language is unambiguous, interpretation of the contract is a matter of law for the court. *Adelman v. State Farm Mut. Auto. Ins. Co.*, 255 Pa.Super. 116, 123, 386 A.2d 535, 538 (1978); *Blocker v. Aetna Cas. & Sur. Co.*, 232 Pa.Super. 111, 114, 332 A.2d 476, 477-78 (1975). If an ambiguity does exist and if the insurer wrote the policy or is in a stronger bargaining position than the insured, the ambiguity is generally resolved in favor of the insured and against the insurer. *Mohn v. American Cas. Co. of Reading, supra; Lovering v. Erie Indem. Co., supra* at 556, 195 A.2d at 368; *Hionis v. Northern Mut. Insurance Co.*, 230 Pa.Super. 511, 516, 327 A.2d 363, 365 (1974). However, the principle that ambiguities in policies should be strictly construed against the insurer does not control the situation where large corporations, advised by counsel and having equal bargaining power, are the parties to a negotiated policy. *Eastcoast Equipment Co. v. Maryland Cas. Co.*, 38 D.&C.2d 499, 511-12, 218 A.2d 92, 98 (Pa.C.P. 1965), *aff'd per curiam on opinion below*, 207 Pa.Super. 383, 218 A.2d 91 (1966); 13 Appleman, Insurance Law and Practice §7402, at 301 (1976).

As pointed out at page 4 above, Eastern's insurance broker selected the policy forms, prepared the policies, and sent them to the insurance companies for execu-

tion. Under these circumstances, the Pennsylvania cases indicate that conflicts over the interpretation of an insurance contract should be resolved against the party preparing the contract. *See Sykes v. Nationwide Mutual Insurance Co.*, 413 Pa. 640, 643, 198 A.2d 844, 845 (1964) ("where ambiguity clouds interpretation the contract in controversy must be interpreted against its authors"); *Cadwallader v. New Amsterdam Cas. Co.*, 396 Pa. 582, 586, 152 A.2d 484, 487 (1959) ("if there be any ambiguity in the contract of insurance it must be resolved in favor of the insured *since it was the insurer who wrote the contract*" (emphasis added)). At a minimum, the above cited cases require that we not construe the language against the defendants.

These legal principles are fully applicable to the interpretation of business interruption insurance policies in Pennsylvania. *Cleland Simpson Co. v. Fireman's Ins. Co. of Newark*, 11 D.&C.2d 607, 612-13, 140 A.2d 41, 44 (Pa.C.P. 1957), *aff'd per curiam on opinion below*, 392 Pa. 67, 140 A.2d 41 (1958); *Nusbaum v. Hartford Fire Ins. Co.*, 276 Pa. 526, 120 A. 481 (1923).[12]

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12. The *Nusbaum* case returned to the Pennsylvania Supreme Court after trial on remand, *Nusbaum v. Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926). In *Nusbaum II* the court found no error in the jury's determination of the cause of the insured's loss or calculation of the insured's damages. Eastern argues that *Nusbaum II* stands for the proposition that "it is for the jury to determine the measure of damages" (Reply Brief for Appellant-Cross-Appellee at 14). Indeed, *Nusbaum II* permits a jury to determine the value of each element in an insurance policy's formula for recovery. However, the formula for recovery is not a jury question, but a question of law for the judge to determine from the language of the policy.

Also, it is noted that it may well not have been possible to grant summary judgment for the insurer before trial because evidence offered at the trial might have disclosed an ambiguity. *See Horowitz v. American Casualty Co. of Reading, Pa.*, No. 487 (Pa.Super. April 3, 1980) (reversing summary judgment for insurer on issue whether business interruption policy excluded coverage because court "unable to say that [insured's] interpretation of the . . . exclusion is

With these legal principles in mind, we turn to the language of the policy in controversy. The policy sets out a general statement of its coverage and then addresses the determination of the value of the loss insured. It reads as follows:

"3. COVERING ON:

. . .

(B) This policy also insures against loss of earnings (as defined herein) resulting from damage to, or destruction of any of the property of the Assured occurring during the term of this policy.

. . .

"10. VALUATION:

. . .

b. *Business Interruption* — Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the Assured directly resulting from such interruption of business, but not exceeding the reduction in earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair or replace such part of the property herein described as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this policy.

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clearly wrong"). The appellate court in *Horowitz* held that the trial judge improperly decided on summary judgment that the exclusion was unambiguous. It remanded since the ambiguity "upon appropriate testimony might be resolved" in the insured's favor, even though the policy was negotiated and not merely the insurer's form. The exclusion in *Horowitz* differed from the one we construe today. More important, Eastern had an opportunity at trial to produce evidence of an ambiguity, but failed to do so based on the record before us.

> Due consideration shall be given to the continuation of normal charges and expenses, including payroll, expense, to the extent necessary to resume operations of the Assured with the same quality of service which existed immediately preceding the loss.

"EARNINGS DEFINED: For the purpose of this insurance "Earnings" are defined as . . . :

"(a) Total net sales value of production,[13]

. . .

> . . . In determining "Earnings" due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred.

"EXPENSES INCURRED TO REDUCE LOSS: Any and all expense incurred by the Assured to reduce loss hereunder is covered by this insurance to the extent only of the loss which would have been sustained had such expense not been incurred."

A.

As noted above, the insurers argue that this policy is unambiguous and makes no provision for recovery of new expenses. Eastern disagrees and contends, first, that the language in paragraph 10-b defining recovery is ambiguous and hence the rule of construction that ambiguous language should be interpreted against the insurer and in favor of coverage should be applied. See

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13. The formula for determining "earnings" provided in the policy includes several factors which have been deleted for simplicity, because their impact on the value of the earnings figure in this case is effectively zero.

cases cited above at the top of page 13. We agree with the insurers and find this language unambiguous. For this reason, the rule that contracts are construed strictly against the insurer cannot apply. *Penn-Air, Inc. v. Indemnity Ins. Co. of N.A.*, 439 Pa. 511, 517, 269 A.2d 19, 22 (1970); *Patton v. Patton*, 413 Pa. 566, 573, 198 A.2d 578, 582 (1964); *Miller v. Prudential Ins.*, 239 Pa.Super. 467, 472, 362 A.2d 1017, 1020 (1976). As will be explained below, the language of paragraph 10-b itself is an adequate guide to interpretation. Two other courts of appeals have arrived at the same conclusion when interpreting business interruption policies using similar language. *Rogers v. American Ins. Co.*, 338 F.2d 240, 242 (8th Cir. 1964); *American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 928 (6th Cir. 1957) (holding that the policy is unambiguous and that "the loss must be determined strictly in accordance with the terms of the insurance policies . . ."). Accordingly, we need not resort to rules of construction.

Paragraph 10-b sets forth a formula precisely limiting the scope of recovery. The policy states that the business interruption loss shall not exceed "the reduction in earnings less charges and expenses which do not necessarily continue during the interruption." A close analysis of the terms of this formula demonstrates that it is subject to only one reasonable interpretation.

The first element of the formula is "the reduction in earnings." To understand this element, the term "earnings" must first be understood. On the facts of this case, earnings are the "total net sales value of production." This phrase refers to the value of the coal which Eastern would have mined during the period of interruption, if operations had continued.[14] In light of this definition of

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14. This conclusion is supported by paragraph 10-b's direction that "[i]n determining 'Earnings' due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred."

"earnings," the phrase "the reduction in earnings" can only refer to the difference between expected earnings and actual earnings — in mathematical language, the expected value of production if no interruption had occurred minus the actual value of production from mining operations. As the mine was totally closed after the fire, the actual value of production in this case was zero. Accordingly, "the reduction in earnings" in this case equals the value of lost production.

The second element of the formula is the phrase "charges and expenses which do not necessarily continue during the interruption." This language refers to expenses that the insured business incurs during normal operations which, because of the work stoppage, it does not need to incur during the interruption, such as fuel to run machinery in the mine.[15] Thus, the second element of the formula refers to expenses which could properly be discontinued during the interruption.

The formula directs that the recovery may not exceed the first element *less* the second element. Thus, in

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NOTE 14 — *(Continued)*

This direction provides that earnings will be calculated by determining the receipts of the mining operation before the interruption and extrapolating future receipts from this figure in light of the business circumstances of the insured business during the period of interruption. In this case, the guidance means that one looks to prior experience for an estimate of the amount of coal which would have been mined, and then applies interruption period prices to that amount to determine the value of lost production.

15. The word "necessarily" permits the insurance company to challenge the insured's decision to continue an expense. However, the policy's statement that:

> "Due consideration shall be given to the continuation of normal charges and expenses, including payroll, expense, to the extent necessary to resume operations of the Assured with the same quality of service which existed immediately preceding the loss."

limits the insurer's right to assert that an expense, which was continued, was not necessary.

fuller terms, the formula provides that discontinued expenses be subtracted from the value of lost production. Recovery may not exceed the resulting figure. Eastern's initial claim filed with the insurers followed this formula precisely,[16] demonstrating that this provision of the poli-

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16. Plaintiff's initial claim was filed as follows:

			Cont. Expenses & Lost Net Profit
Calculation of Loss			
Sales Value of Production of 615,659 tons		$10,565,028	
Less:			
Ordinary Payroll	$2,146,576		
Work Comp. & S.S.	242,939		
Materials	1,047,544		
Power	189,500		
United M.W. Welfare	517,510		
Royalty	49,253		
Taxes	369,776	4,563,098	
Gross Earnings		$ 6,001,930	
General & Administrative Exp.	*Projected*		
Salaries & Foreman	$1,146,763		$ 904,687
Work. Comp. & S.S.	158,953		125,568
Town & Incidental	28,842		7,398
Power (fixed)	123,874		123,874
Vacation & Holiday	415,849		—
Insurance	41,548		41,548
Property Taxes	50,633		50,633
Pension & Insurance	155,938		155,938
Other Inc. & Exp.-Mining	17,753		17,753
Depreciation	523,137		523,137
Miscell. Inc. & Exp.-Adminis.	28,283		28,283
Pittsburgh Overhead	193,845		193,845
Sales Expenses	169,636		169,636
Development & Depletion	90,780	3,145,834	88,881
Projected Net Profit		$ 2,856,096	2,856,096
Projected Net Profit & Cont. Expenses			$5,287,277

(Plaintiff's Exhibit 54, 784a.)

cy was understood by both parties to the contract. This fact further buttresses our conclusion that the language is not ambiguous and that its terms should be strictly followed.

From this review of the formula used to calculate recovery under the policy, we believe it is apparent that the policy makes no provision for recovery of an expense which is newly created by the interruption, such as Eastern's substitute and brokerage coal cost. The policy merely insures that the interrupted business will receive the amount of money which continued operation would have produced reduced by the amount of any routine costs which the business avoided by closing. If new expenses are produced by the interruption, the formula under paragraph 10-b makes no allowance for their recovery.

Despite the failure of the language of paragraph 10-b to insure against new expenses, Eastern argues that coverage for new expenses must be provided on the basis that business interruption insurance should pro-

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NOTE 16 — *(Continued)*

This sheet follows the formula described in the text to arrive at the recovery figure of $5,287,277. "Earnings" is the value of projected sales: $10,565,028. This figure is reduced by non-continuing expenses. Eastern has separated non-continuing expenses into two categories. The first category is under the heading "less" and totals $4,563,098. When this amount is subtracted from the earnings figure, $6,001,930. remains. The second category is under "General & Administrative Exp." Under the heading "Projected," the insured has added all expenses, continuing and non-continuing. This amount totals $3,145,834. This amount is also subtracted from earnings, leaving $2,856,096. The insured then added all of the continuing "general and administrative expenses" (found in the right-hand column) to the $2,856,096. figure to arrive at the final claim of $5,287,277. The effect of subtracting all continuing and non-continuing expenses from earnings and then adding all continuing expenses was to reduce earnings only by the amount of non-continuing earnings in accordance wi h the formula in the policy.

tect insureds from all loss due to business interruptions. Eastern bases this assertion on the generally accepted statement that business interruption insurance "is designed to do for the insured in the event of business interruption caused by fire, just what the business itself would have done if no interruption had occurred . . ." *National Union Fire Ins. Co. v. Anderson-Prichard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944). Eastern extrapolates from this general statement that the recovery must leave the insured in the same financial position it would have been in at the end of the policy's term had no interruption taken place. Eastern argues that, because it is in a worse financial position after the interruption, due to the new expenses, than it would have been in if no interruption had occurred, new expenses must be covered.

Eastern's argument based on this general statement fails because the policy makes no provision for recovery of new expenses and because the clear language of the policy limits recovery to the amount derived from the formula discussed above. If new expenses are to be compensated, the express language limiting recovery would have to be ignored. Since there is no ambiguity, there is no basis for ignoring this language.

Moreover, there is no support in the case law for Eastern's argument. *National Union Fire Ins. Co. v. Anderson-Prichard Oil Corp., supra*, and the many other cases citing the general statement concerning business interruption insurance quoted above do not address the problem of whether to award recovery for new expenses produced by an interruption. They simply note in situations where new expenses have not been incurred, that the recovery under a business interruption insurance policy is likely to return the insured to the financial status it would have been in if no interruption had occurred. In situations where no new expenses are incurred, this statement is correct. In light of the lack of ambiguity in the policy, the absence of any provision

compensating new expenses in paragraph 10-b's formula, and Eastern's failure to uncover any cases in which recovery for new expenses was obtained under a business interruption policy,[17] we hold that new expenses produced by the interruption are not covered by the formula for recovery provided in paragraph 10-b of this policy. In charging the jury in accordance with Eastern's theory of paragraph 10-b, the district court erred.

B.

The district judge also charged the jury with a second theory of recovery for the substitute and brokerage coal expense under the policy. The court charged that these additional expenses could be compensated under the "Expenses Incurred to Reduce Loss" provision of paragraph 10-b of the policy. This charge was also incorrect.

The provision provides as follows:

> "EXPENSES INCURRED TO REDUCE LOSS: Any and all expense incurred by the Assured to reduce loss hereunder is covered by this insurance to the extent only of the loss which would have been sustained had such expense not been incurred."

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17. Eastern's reliance upon *Supermarkets Operating Co. v. Arkwright Mut. Ins. Co.*, 257 F.Supp. 273 (E.D.Pa. 1966), is misplaced. In *Supermarkets* the insured's market was destroyed by fire. The policy was similar to the one at bar in that recovery was measured by the formula, "gross earnings, less all charges and expenses which do not necessarily continue during the period of interruption . . ." *Id.* at 276. The insurer argued that the insured's lease payments on the destroyed building were an expense which did not necessarily continue after the fire because the destruction of the building terminated the obligation to pay rent. *Id.* at 275. The court, however, found that the obligation to pay rent continued, and that the lease payments were not a "not necessarily continuing expense." Accordingly, the insurer was not permitted to reduce the recovery by the amount of the lease payments. The case did not address the question of new expenses.

Here, again, the words of the policy are not sufficiently ambiguous to necessitate the application of rules of construction. *See American Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 930 (6th Cir. 1957). As noted above at page 16 ff., Pennsylvania cases hold that a clause must be ambiguous before a court applies rules of construction.

Eastern argues that its substitute and brokerage coal expense was "incurred by the Assured to reduce loss" caused by the interruption and, therefore, is covered by the policy. We do not doubt that Eastern's liability to Sharon was reduced by its resort to substitute and brokerage coal. However, Eastern fails to take account of the exact words of the policy. The provision compensates insureds for expenses incurred "to reduce loss *hereunder*" (emphasis added). We believe the phrase "loss hereunder" plainly refers to loss compensated under the policy.[18] As was established above in discussing the formula for recovery under paragraph 10-b, the new brokerage and substitute coal expenses resulting from the interruption are not losses compensated under this policy. Accordingly, such new expenses cannot serve to "reduce loss hereunder."

Our interpretation is consistent with the clear intent of the "Expenses Incurred to Reduce Loss" provision. The provision is designed to encourage insureds to undertake new expenses which will result in an overall reduction of the insurer's liability. Support for our interpretation can be found in the Sixth Circuit's case of *American Alliance Ins. Co. v. Keleket X-Ray Corp.*,

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18. The phrase "loss hereunder" is also used in the first sentence of paragraph 10-b of the policy providing that "Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED . . . not exceeding the reduction in earnings less charges and expenses which do not necessarily continue . . ." In both contexts we believe the phrase "loss hereunder" plainly refers to loss compensated under the policy.

supra. In *Keleket* the district court had awarded recovery under a provision of a business interruption insurance policy substantially similar to the one at bar[19] for expenses incurred in decontaminating a building which had been contaminated by radioactive material in a small explosion inside the building. The court reversed the district court's award under the provision, and explained that:

> "[T]he insured [has not] introduced any evidence of expenses necessarily incurred to reduce the business interruption losses. *Had the plaintiff shown that the period of interruption had been shortened by use of overtime labor at premium wages, for example, then the premium wages would be allowable up to the amount by which the liabilities of the insurers under the business interruption policies had been reduced.* The record is devoid of evidence to this effect. In the absence of evidence showing that the expenditures had actually reduced the business interruption losses, the district court was in error in allowing any decontamination expense as an expense incurred to reduce the loss under the business interruption policies."

Id. at 930-31 (emphasis added).

As the brokerage and substitute coal expense in no way served to reduce the insurer's liability under the policy, it cannot be compensated under the "Expenses Incurred to Reduce Loss" provision. Eastern's interpretation, which renders the word "hereunder" meaningless,

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19. The policy read: "Expense to Reduce Loss: This policy insures such expenses as are necessarily incurred for the purpose of reducing any loss under this policy (except expense incurred to extinguish a fire) not exceeding, however, the amount by which the loss under this policy is thereby reduced, and such expenses shall not be subject to the application of the contribution clause." *Id.* at 930.

is plainly at odds with the unambiguous meaning of the provision.

Our review of the pertinent case law and the language of this policy convinces us that Eastern is not entitled to recover new expenses produced by the closing of the Joanne Mine. Accordingly, the insurer's motion for judgment n.o.v. should have been granted.

IV.

In conclusion, we hold that the district court did not err in entering judgment n.o.v. against Eastern based on the speculative nature of the evidence concerning the high sulphur content of some of the coal to be delivered to Sharon Steel Corporation. We further hold that the district court erred in denying the motion for judgment n.o.v. against Eastern with respect to the brokerage and substitute coal expenses. Accordingly, the case will be affirmed in part, reversed in part, and remanded to the district court for entry of judgment against the insurers for $287,277, the amount conceded to be owed by defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

EASTERN ASSOCIATED COAL CORP.

v.

AETNA CASUALTY & SURETY CO.

Civ. A. No. 75-855.

United States District Court,
W. D. Pennsylvania.

Aug. 22, 1979.

OPINION

KNOX, District Judge.

Plaintiff, Eastern Associated Coal Corporation, a corporation incorporated under the laws of West Virginia with its principal office in that state but also qualified to do business in Pennsylvania with offices in Pittsburgh, has brought suit against Aetna Casualty and Surety Company and certain other insurance carriers including underwriters at Lloyds of London, subscribing to policy No. 2080712 to recover on an insurance contract containing a clause insuring against business interruptions. The defendants are all citizens of states other than West Virginia or Pennsylvania or a foreign country and hence there is complete diversity of citizenship between the parties. The case was tried to a jury, which after 10 days of trial and lengthy deliberations returned a verdict in favor of the plaintiff in the amount of $4,736,377 allocated among the defendants in accordance with agreed upon percentages. At the trial, the plaintiff had claimed a total amount of damages of $4,952,000. The question of interest was reserved at the time of trial for determination by the court after verdict.

The defendant has filed the usual motions for judgment NOV and for a new trial. Both matters have been thoroughly argued and briefed and are now before the court for decision.

The plaintiff is engaged in the business of mining and supplying both metallurgical coal which is used in steel plants in the making of steel, and so-called steam coal which is largely sold to power plants for use in their boilers. Metallurgical coal is required to have a sulphur content substantially below that of steam coal.

We are concerned here with a loss claimed by the plaintiff to result from interruption of its business in the Joanne Mine located near Rachel, West Virginia, by a fire which occurred January 14, 1974. At that time, the evidence shows that a fire broke out in the underground part of the mine, efforts to stop it were unsuccessful, and the mine was closed off and sealed for a period of about one year until June 1974. We are only concerned here under the policy with the period of one year after the fire. It appears, however, that considerable work was necessary to return the mine to active production. Production was resumed on a limited basis in late December 1974.

The insurance with which we are concerned here involves various fire and casualty policies issued by numerous insurance companies. The policies were originally purchased through insurance agents in package policies issued in 1972 which insured against damage by fire to plaintiff's real and personal property and also against damages resulting from interruption of its business. The annual premium was $44,417. The policies were issued in four layers. The first layer, subject to a $500,000 deductible covered losses up to $5,000,000 or a net of $4,500,000 after applying the deductible. The second layer with which we are concerned in this case insured losses over $5,000,000 up to $10,000,000. The third and fourth layers with which we are not concerned covered losses in excess of $10,000,000 and $15,000,000 respectively.

The insurers involved in the first layer of coverage for the $5,000,000, less than $500,000 deductible paid plaintiff the full amount of $4,500,000 due on that layer. It appears, however, that defendants admit that there was an excess of $287,277 over and above the $5,000,000 which would be due from the second

layer of insurance regardless of the outcome of the other issues. While there was some dispute about this at the time of trial, it appears there was no serious dispute as to this matter and it was dropped at argument.

The business interruption clauses of the policy insured the defendants against, *inter alia,* "loss of earnings". In paragraph 10 with respect to this matter, it was specifically provided as follows:

> "b. *Business Interruption*—Recovery in the event of loss hereunder shall be the ACTUAL LOSS SUSTAINED by the Assured directly resulting from such interruption of business, but not exceeding the reduction in earnings less charges and expenses which do not necessarily continue during the interruption of business, . . . Due consideration shall be given to the continuation of normal charges and expenses, including payroll, expense, to the extent necessary to resume operations of the Assured with the same quality of service which existed immediately preceding the loss.
>
> "*EARNINGS DEFINED*: For the purpose of this insurance 'Earnings' are defined as the sum of: (a) Total net sales value of production,
>
> * * *
>
> (c) Other earnings derived from operation of the business, *less the direct cost of*:
>
> (1) Raw Stock, from which such production is derived;
>
> (2) Merchandise sold, including packaging materials, therefor;
>
> (3) Materials and supplies consumed directly in service(s) sold; and
>
> (4) Service(s) purchased from outsiders (not employees of the Assured) for resale which do not continue under contract.

> No other costs shall be deducted in determining 'Earnings'. In determining 'Earnings', due consideration shall be given to the experience of the business before the date of damage or destruction and the probable experience thereafter had no loss occurred.
>
> "*EXPENSES INCURRED TO REDUCE LOSS:* Any and all expenses incurred by the Assured to reduce loss hereunder is covered by this insurance to the extent only of the loss which would have been sustained had such expense not been incurred."

The evidence further shows that during the year following the fire there was an unprecedented demand for both high volatile metallurgical coal and steam coal of the types produced in the Joanne Mine, this being the first so-called energy crises experienced in this country. It was estimated that the mine would have produced during the year following the fire 181,742 tons of metallurgical coal and 433,917 tons of steam coal.

Prior to the fire, metallurgical coal was under contract for sale to Sharon Steel Corporation under a ten-year coal supply agreement dated June 18, 1969, which provided for payment at $7.25 per ton f.o.b. for metallurgical coal subject to escalation for various reasons. At the time of the fire the price for this coal was $13.34 per ton which was substantially lower than the market price. Steam coal from the mine had been sold largely to Ontario Hydro-Electric Power.

Under the contract with Sharon Steel, Sharon was not required to buy any minimum tonnage of Eastern's metallurgical production but, except for one year, Sharon had taken all the metallurgical coal from this mine.

Following the fire, Eastern claimed it was excused from supplying coal to Sharon under a *force majeure* clause contained in the contract providing for excuses in cases of strikes, labor shortages, fires, floodings or accidents at the mine or other matters beyond the control of the seller. A suit was instituted in the Court of Common Pleas of Allegheny County,

Pennsylvania, by Sharon to compel compliance with the contract by the defendant but the arbitration went against plaintiff. Provision had been made for the supply of substitute coal from plaintiff's Wharton No. 4 Mine, also located in West Virginia, but after the fire no coal was available from this mine because the coal from Wharton No. 4 was contractually committed to other customers. The arbitrators held that the *force majeure* clause did not excuse plaintiff's failure to supply coal to Sharon, holding that by reason of a certain other clause in the contract, plaintiff had an objection to supply Sharon's requirements from other sources in the event of deficiencies at the Joanne Mine. The arbitrators therefore held that Eastern must supply the deficiency from its Wharton No. 4 Mine, which proved impossible, or otherwise it must arrange for the supply to Sharon of other high volatile coal of a quality and at a price acceptable to Sharon. As a result of the arbitration award, plaintiff was required to go into the open market at a time of skyrocketing prices and obtain and supply to Sharon other high volatile metallurgical coal in order to comply with its obligations under the contract.It is this loss which Eastern sustained in the year following the fire which is the main subject of contention in this case.

(A) The motion.

Defendants have filed a motion for judgment NOV or for New Trial with the grounds for the latter not stated with any degree of particularity.[1]

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[1]"Defendants move the court to set aside the verdict entered in the above entitled action on the 19th day of December, 1978, and the judgment entered thereon on the 20th day of December, 1978, and to enter judgment in accordance with defendants' motion for directed verdict made during trial. In the alternative, defendants move this court for an order granting a new trial on the grounds stated in defendants' motion for directed verdict and all other grounds that may be revealed after a study of the record.

"Defendants' motion for the directed verdict should have been granted because the claims asserted by plaintiff were, as a matter of law, not covered by defendants' policies of insurance and, further, because the evidence in the case did not establish plaintiff's claims nor the fact that defendants were liable for any portion of said claims. *(continued)*

It will be noted that the reasons given for a new trial are the grounds stated in defendant's motion for directed verdict and all other grounds that may be revealed after a study of the record.

We will, of course, consider the motion for judgment NOV but point out we cannot grant a judgment for the defendant in view of the fact that liability in the amount of $287,277, while subject to some denials at trial, was generally admitted and is specifically admitted in defendant's brief filed in conjunction with these motions. We will, however, consider plaintiff's right to recovery in general to amounts over $287,277.

With respect to the motion for new trial, under Rule 7(b) it is provided that the motion shall be in writing and shall state with particularity the grounds therefor. It has been held that these requirements are mandatory. *U. S. v. 64.88 Acres of Land,* 25 F.R.D. 88 (3d Cir. 1960). The court has, however, examined the grounds stated in the brief for granting a new trial and finds them to be without merit. We do find, however, that an item of damage which cannot legally be claimed by the plaintiff under this record has crept into the case and requires the court to order that the judgment be reduced.

(B) Motion for Judgment NOV.

As previously noted we are unable to grant a complete judgment NOV for the defendants because there is presently no contest with respect to the item of $287,277. We will however consider the other matters raised therein. These matters generally were previously considered by the court in defendant's motion for summary judgment which was decided adversely against them in a memorandum opinion filed October 18, 1977 and the court adheres to what was said therein. As is noted, this case is really not a controversy over liability but rather a

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"Further, that said verdict and judgment were contrary to the law and facts in the case. Defendants further move for a directed verdict that plaintiff is not entitled to recover from defendants any sums in excess of $287,277 on the ground the defendants' maximum liability under the contracts of insurance issued by them cannot exceed said sum."

controversy over the amount of plaintiff's damages and it was held this amount had to be determined by the jury.

We have previously noted that the law requires the policy to be construed most strongly against the insurers. *Nusbaum v. Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926); *Philadelphia Mfg. Insurance Co. v. Rose*, 368 Pa. 363, 81 A.2d 566 (1951) and *Sehon Stevenson & Co. v. Buckeye Ins. Co.*, 298 F.Supp. 1168 (S.D.W.Va.1969). The laws of both West Virginia and Pennsylvania appear to be in accord on this. It was pointed out that the general rule as laid down by the courts is that business interruption insurance policies are intended to return the insured the amount of profit which it would have earned had the destruction by fire or other casualty not intervened. It is also true, of course, that expenses derived from events not related to the fire or other casualty are not covered. See opinion of Snyder, D. J. of this court, in *PPG Industries v. Appalachian Ins. Co.*, Civil Action No. 77-90, opinion filed March 26, 1979. On the other hand, the courts have given a broad interpretation to coverage under business interruption. The policy commenced, in Paragraph 3(b), to state that it insures against loss of earnings as defined herein resulting from damage to or destruction of property of the insured during the terms of this policy. Specifically with respect to business interruption it says it shall be the ACTUAL LOSS SUSTAINED by the assured directly resulting from interruption of business but not exceeding reduction in earnings. It is further noted that in the last paragraph of the business interruption clause it is stated, "Expenses Incurred to Reduce Loss; any and all expense incurred by the assured to reduce loss hereunder is covered by this insurance to the extent only of the loss which would have been sustained had such expense not been incurred.

The courts generally have held that losses of the type under consideration here are covered by such business interruption clause. It is obvious from the testimony here that the fire at the Joanne Mine was one of the risks covered and that the business of the plaintiff was completely interrupted for over a year, the maximum period covered by the policy.

The court quoted to the jury the general rule as laid down in *National Union Fire Insurance co. v. Anderson Pritchard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944) where the court said:

> "In other words, the policy is designed to do for the insured in the event of business interruption caused by fire, just what the business itself would have done if no interruption had occurred ... no more."

In *Fidelity Phoenix Fire Insurance Co. v. Benedict Coal Corp.*, 64 F.2d 347 (CCA 4th 1933), it was held that loss of profits on rental of miners' houses in operation of a commissary were properly considered where the head house tipple and conveyor belf of the mine were destroyed by fire.

Also, in *General Ins. Co. v. Pathfinder Petroleum Co.*, 145 F.2d 368 (CCA 9th 1944), it was held that loss from a plant yet to be built could be recovered and profit flowing from a contracted capital investment were included in business interruption insurance coverage.

The Pennsylvania courts have specifically held that expenses incurred by virtue of a contract as a result of a fire must be included. This case, which is very close to ours, is *Supermarkets Operating Co. v. Arkwright Mutual Ins. Co.*, 257 F.Supp. 273 (E.D.Pa. 1966). The case involved an express covenant to pay rent notwithstanding destruction of the building by fire and that this obligation to continue to pay rent should be considered as an expense continuing after the fire and covered by business interruption.

It should also be noted that while generally the construction of an insurance policy is for the court, nevertheless, where there are words similar to those involved in this policy, the matter should be left to the jury. *Nusbaum v. Hartford Fire Ins. Co.*, supra, where the court said:

> "As to the contention that plaintiff's loss of profits was caused by the increased cost of production and the decrease in selling price and not by fire, it is sufficient to say that the argument made in support of it has not

> convinced us that this question was not properly left by the court to the jury."

See also *Heller v. Royal Ins. Co.*, 177 Pa. 262, 35 A. 726 and holding of the Judicial Committee of the Privy Council in *Mt. Royal Assurance Co. v. Cameron Lumber Co. Ltd.*, British Appeals cases 1934, p. 313.

The defendant relies most strongly on the decision of the Supreme Court of Wisconsin in *Goetz v. Hartford Fire Ins. Co.*, 193 Wis. 638, 215 N.W. 440 (1927). As pointed out by the plaintiff, this case is actually in support of plaintiff's theory because the court said:

> "It is clear that policy is not to indemnify against liability necessarily incurred during such suspension period. In order therefore that a liability incurred during such period shall be within the indemnity, it is necessary to show that but for the fire the insured could have made or obtained the wherewithal to meet such particular liability. Otherwise, it has sustained no actual loss."

This is in accord with the situation here since the insured did show that but for the fire it would have supplied Sharon Steel Corporation with a certain amount, viz: 181,000 tons of metallurgical coal and as a result of the fire it had to go out on the open market and cover or else supply substitute coal from other mines which could have been sold elsewhere at a much higher price.

It should be noted that when the case was referred to arbitration by the court of common pleas, the defendants were given notice of the pendency of the arbitration and an opportunity to defend the case. This they did not do but instead ignored the state suit and the arbitration proceedings. Under these circumstances as the court told the jury, this court is bound by the decisions of the state court and the arbitration award and the jury was not to inquire into the terms of the same. See page 1219 where the court was told that:

> "It is not for us to inquire into the wisdom or correctness of the arbitrator's award. That was the agreement of the parties that such disputes were to go there."

They are a matter which was before the court under whose jurisdiction the arbitrators function and that is the end of the matter. In other words we are bound by the arbitration award.

It was further pointed out that the question before the jury was whether they believed plaintiff's testimony and they could find that the purchases were not necessary or the prices alleged were not correct. But if they found that they were, they would be entitled to consider this as covered by the policy, that is, as expenses incurred to reduce the loss because if the plaintiff had not reduced the loss by compliance with the arbitrator's award and not carried out the contract, they might have been subjected to much greater damage suits by Sharon Steel and orders of the court to enforce the arbitrator's award. It was, of course, pointed out to the jury that the policy provided that due consideration was to be given certain matters of expense and that was a matter for them to decide. The jury heard the very complicated testimony over a period of eleven days. They did not accept all of plaintiff's figures and arguments. Instead of allowing the claim in full in the amount of $4,952,000, the same was reduced by over $200,000 to $4,706,377. As will be discussed later in this opinion, the court determines that a portion of this amount, to wit: the sum of $890,744 is not sustained by the evidence and is based upon a speculative element introduced into the damages at the last moment and the judgment as entered upon the verdict will be reduced by that amount. Otherwise, the motion for judgment NOV will be denied.

(C) Motion for New Trial.

As we have previously stated, the motion for new trial does not specify any particular grounds therefor but in briefs and in argument a number of reasons were raised and argued. This is not sufficient because under Rule 7(b) as pointed out, the grounds must be stated with some degree of particularity in the motion.

Regardless of this, the court has reviewed the reasons mentioned in defendant's brief as to why a new trial should be granted and the court finds that none of them have any particular merit.

Complaint is made of exclusion of expert testimony of witness Ron Rodda who was called to interpret the meaning of the insurance contract. This is not permitted. The interpretation of the insurance contract is a matter for the court. *Treasure Craft Jewelers Inc. v. Jefferson Ins. Co.*, 431 F.Supp. 1160 (E.D.Pa.1974) aff'd 583 F.2d 650 (3d Cir. 1978). There is nothing in Rule 702 which would allow an expert to interpret a legal document and substitute his judgment for that of the court. *Fiorentino v. Travellers Ins. Co.* (1978 Fire and Casualty cases) p. 1078, is not in point because that involves a suit against an insurance agent for failure to provide liability insurance coverage.

The rejection of the government report as to the Joanne Mine is considered proper and it was excluded (Tr. p. 1904) as too remote and confusing to the jury under Rule 403.

The point of failure to instruct the jury on the interpretation of the policy is not well taken. The court at pages 1215-1220 summed up the provisions of the policy with respect to the amount to be recovered under business interruption insurance. Matters which were to be considered by the jury in dealing with the figures which had been submitted by the parties were dealt with, particularly the somewhat vague words "due consideration" (p. 1217) were defined for the jury and also the meaning of the words "EXPENSES INCURRED TO REDUCE LOSS". The theories of the parties were dealt with at length at the end of 1219. The jury was clearly instructed that if they believed plaintiff's testimony in this respect, they would be entitled to consider these losses on purchases of brokerage coal and substitute coal as covered by the policy. The court charged the jury that they appeared to be expenses incurred to reduce loss.

The court did not therefore leave the jury adrift without a rudder but dealt with the various items of expense as claimed by the plaintiff and defendant.

It appears from plaintiff's motion for new trial that they are complaining that the court did not direct a verdict one way or another, but as pointed out, the testimony on each side was conflicting and it was a matter for the jury to determine what was the actual loss sustained. Under no circumstances could the court have directed a verdict for the defendant in the face of these claims by the plaintiff. It appears that perhaps defendant is complaining that the court should have directed a verdict for the plaintiff in interpreting the policy but this the court refused to do and under the *Nusbaum* case, supra. The amounts were properly left to the jury.

(D) Reduction of Judgment.

In the tabulation of actual loss sustained under the second layer of insurance (p. Ex. 61) as testified to by Mr. Stefl, President of Eastern Associated Coal Corp. (See notes of testimony pp. 548-575) it appears that as a result of attempts to enhance losses made in the last ten days before trial, the questionable item of $890,744 (see p. 548) was injected into the calculation. This is based upon the speculative testimony that Sharon Steel would have rejected approximately 77,000 tons of Joanne coal with a sulphur content in excess of 1.6% which coal could then have been sold on the open market at an enhanced price. The plaintiff in its interrogatories had previously stated that the amount of Joanne coal which would have been sold to Sharon Steel to fulfill the contract would have been 181,742 tons and it is on this that the other figures in Exhibit 61 were based. It appears now, however, that he is claiming that 77,000 tons from Joanne Coal which were included in the 181,742 tons would have been rejected and hence available for sale on the open market.

The court has concluded that there is no legal evidence to support any such claim. The amount is included in P. Ex. 61 in the amount of $1,178,021 which is made up of the $890,744, plus the $287,277 which is admitted by the defendant. The

court has combed the pleadings in this case, the pretrial narrative statements and the notes of the pretrial conference and nowhere is there found any reference to this theory. If the judgment is not reduced, the court is of the opinion that a new trial should be granted because of the injection of this item into the testimony, the verdict in such case having been based upon surprise to the defendant. In view, however, of the fact that the figures are definite and that the amount involved is $890,744, the court is of the opinion that the matter can be handled by a reduction of judgment pursuant to Rule 50(b), this being one of the grounds upon which a directed verdict was sought. In *Garfield Aniline Works v. Zendle* (CCA 3d 1930) 43 F.2d 537, it was held that in an action on a contract where the excess amount can be readily ascertained this may be done instead of following the cumbersome route of the remittitur resulting possibly in a lengthy retrial of the whole case.

Another way to handle this, of course, would be to enter a remittitur requiring plaintiff to remit $890,744 of its verdict within a limited period of time following entry of this order in default whereof a new trial would be granted.

In view of the fact, however, that the figures are very clear as to the amount involved by injection of this speculative testimony into the record, there being no firm evidence upon which the jury could determine how much Joanne Coal which was never mined might have been rejected and no firm evidence but that in desperation Sharon Steel might have accepted metallurgical coal slightly in excess of the 1.6 sulphur content, the court determines that this item must be stricken from the judgment and the judgment reduced accordingly. We will therefore direct that the motion for Judgment NOV be granted to the extent of $890,744 which after deduction from the verdict figure of $4,736,377, will leave plaintiff with the judgment of $3,845,633 for which there is sound basis.

(E) Prejudgment Interest.

The item of prejudgment interest was not submitted to the jury but by agreement of counsel was reserved for the court. (See N.T. p. 1220) Following the verdict, the plaintiff submit-

ted a motion for the court to fix interest asking at first only for interest on $2,175,260 from the date of filing of the complaint on July 11, 1975. Later, the plaintiff filed an amendment to the motion to fix interest requesting the amount of $1,115,700.95 from January 15, 1975, to December 19, 1978, or from such other dates as might be appropriate suggesting also May 1, 1975. The defendants naturally oppose any award for prejudgment interest.

Basically, we start with §337(a) of the Restatement of the Law of Contracts which was adopted by the Pennsylvania Supreme Court in *Penneys v. Pennsylvania Railroad Co.*, 408 Pa. 276, 183 A.2d 544 (1962) which reads as follows:

> §337. When Interest is Recoverable as Damages. If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable as damages for breach of contract as follows:
>
> (a) Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled.
>
> * * *
>
> Comment: b. Where performance is to be rendered on demand or on any other condition precedent, interest as damages will not begin until demand or until occurrence or excuse of the condition; the fact that action may sometimes be maintainable without first making a demand does not change this rule as to interest. If the action is itself held to be the necessary demand, interest will run from the bringing of the action. In cases where, either by agreement or by custom, there is a period of credit, definite or indefi-

nite in extent, there will be no interest as damages until the period of credit is at an end.

Pennsylvania cases on the question of interest on amounts due under fire insurance policies are generally in accord. The basic case is *J. Purdy Cope Hotel Company v. Fidelity Phoenix Fire Insurance Co.*, 126 Pa. Super. 260, 191 A. 636 (1937) where appraisers were appointed to appraise the loss and the court held that interest would be due from the date of filing of the appraiser's findings. The court stated that this was in accord "with a long line of cases in this state dealing with the allowance of interest where money is payable by agreement between the parties and a time is fixed for the payment of it and holding that this constitutes a contract to pay the money at the time fixed and to pay interest on it from a given day in case of failure to pay at that day".

The fact that there is a bona fide dispute as to the amount of the indebtedness is no bar to the granting of interest if the amount offered by the defendant falls short of the amount of the sum found to be due. *J. Purdy Cope Hotel Co.*, supra; *Interlake Inc. v. Erie Industrial Trucks Inc.*, 427 F. Supp. 1012 (W.D. Pa. 1977). Defendant's references to unliquidated damages in cases involving such questions are inappropriate because in this case the damages were capable of being ascertained following the filing of a proof of loss in view of the established market prices of the subject matter viz: market prices of metallurgical coal and high sulphur coal.

See also summary of the law contained in *Samuels v. California Ins. Co.*, 192 Pa. Super. 484, 162 A.2d 48 (1960) citing *inter alia West Republic Mining Co. v. Jones & Laughlin*, 108 Pa. 55 at 69 (1884) holding that it is improper to submit the question of interest due under a contract to the jury and pointing out that the loss generally under fire insurance policies is payable 60 days after filing of proof of loss.

Here there were clauses providing for appraisal and/or arbitration but neither party has sought these remedies and hence they will be deemed waived.

Nor is there any provision in the policies for filing of proofs of loss and hence the usual rule of 60 days from proof of loss cannot be applied. We shall therefore allow interest from the date of demand which was April 21, 1975.

Samuels, supra, and *Western and Atlantic Pipe Line v. Home Ins. Co.,* 145 Pa. 346, 22 A. 665 are not apropos with respect to the question of denial of coverage in toto. The defendant here did not deny coverage in toto. As a matter of fact there was an offer to pay the amount of $287,277 which the court has found to be admitted in this case and as pointed out by the court in the memorandum opinion denying defendant's motion for summary judgment "this is really not a controversy over liability but a controversy over the amount of the plaintiff's damage". It was further stated that "the defendants concede the existence of the insurance policies insuring the plaintiff against business interruption losses and also concede that the fire took place and as a result thereof the business was interrupted for over a year". For this reason we will not apply the rules in the cases where there is a denial of coverage in toto but rather the cases which hold that interest is due from the time the money is due.

In the instant case the fire occurred January 14, 1974, and the period of business interruption for which the defendants would be liable was one year which expired January 14, 1975. Proofs of loss were filed April 21, 1975, which is the date of demand. Defendants cannot be asked to pay before they knew the amount demanded. Verdict was rendered on December 19, 1978. The amount of the recovery as reduced by this court in its opinion is $3,845,633. We will therefore allow interest on $3,845,633 from April 21, 1975. This amounts to therefore 3-2/3 years of interest at 6% for a total of 22% which will be included in the judgment. The judgment, of course carries interest on the total amount as now entered from date of entry December 19, 1978.

APPENDIX C

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 79-2397/79-2398

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

vs.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; HOME INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO. LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,

Appellants in No. 79-2398

(D. C. Civil No. 75-0855)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on May 19, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered August 22, 1979, be, and the same is hereby affirmed insofar as it entered judgment n.o.v. against Eastern based on the speculative nature of the evidence concerning the high sulphur content of some of the coal to be delivered to Sharon Steel Corporation; reversed insofar as the said court denied the motion for judgment n.o.v. against Eastern with respect to the brokerage and substitute coal expenses; and the cause is remanded to the district court for entry of judgment against the insurers for $287,277, the amount conceded to be owed by the defendants, all in accordance with the opinion of this Court.

ATTEST:

/s/ SALLY MRVOS

Clerk

September 23, 1980

Certified as a true copy and issued in lieu of a formal mandate on October 27, 1980.

Test: SALLY MRVOS

Clerk, United States Court of Appeals
for the Third Circuit

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 79-2397 & 79-2398

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

v.

AETNA CASUALTY & SURETY COMPANY, et al.,
Appellants in No. 79-2398

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by Appellant-Appellee Eastern Associated Coal Corp., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for hearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: October 17, 1980

C-4

Supreme Court of the United States

No. A-575

EASTERN ASSOCIATED COAL CORP.,
Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY,
ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 16, 1981.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of January, 1981.

C-5

United States Court of Appeals

FOR THE THIRD CIRCUIT

January 29, 1981

Nos. 79-2397/98

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

vs.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; HOME INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO. LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,
Appellants in No. 79-2398

(D. C. Civil No. 75-855)

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges.*

1. Motion by Eastern Associated Coal Corp. for leave to file petition for reconsideration of petition for rehearing with suggestion for rehearing en banc out of time,

2. Motion by Eastern Associated Coal Corp. for leave to file petition for reconsideration of petition for rehearing with suggestion for rehearing en banc in excess pagination (i.e. with addendum)

in the above-entitled cases in which the certified judgment in lieu of formal mandate issued October 27, 1980.

Respectfully,

/s/ SALLY MRVOS
Clerk

mgp
enc.

The foregoing Motions are granted only insofar as panel rehearing is concerned and without the suggestion for rehearing en banc, which is extremely untimely under the following provision of F.R.A.P. 35(c):

> "A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition *or otherwise*." (Emphasis supplied.)

By the Court,

/s/ FRANCIS L. VAN DUSEN
Judge

Dated: 2/24/81

C-7

United States Court of Appeals

Nos. 79-2397/98

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

v.

AETNA CASUALTY & SURETY COMPANY, et al.,
Appellants in No. 79-2398

(D. C. Civil No. 75-855)

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

ORDER

The petition to recall the mandate, filed by Eastern Associated Coal Corp. is hereby denied.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: March 6, 1981

C-8

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 79-2397 & 79-2398

EASTERN ASSOCIATED COAL CORP.,
Appellant in No. 79-2397

v.

AETNA CASUALTY & SURETY COMPANY, et al.,
Appellants in No. 79-2398

(D. C. Civil No. 75-855)

SUR PETITION FOR REHEARING
BEFORE ORIGINAL PANEL

Present: ADAMS, VAN DUSEN and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by Eastern Associated Coal Corp., appellant in No. 79-2397, in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: March 6, 1981

APPENDIX D

422 ATLANTIC REPORTER, 2d SERIES

BERKELEY INN, INC., *Appellant,*

v.

CENTENNIAL INSURANCE COMPANY and Wesley Herbol, Abner McMaster and Evan MacEwen, Individually and d/b/a Herbol, McMaster and MacEwen Insurance Agency.

Superior Court of Pennsylvania.

Argued Nov. 12, 1979.
Filed Sept. 19, 1980.

Reargument Denied Dec. 24, 1980.

Insured brought action to recover casualty losses from insurer after building used in insured's motel and restaurant business was partially destroyed by fire. The Court of Common Pleas, Erie County, No. 3654—A of 1974, Carney, McClelland and Pfadt, JJ., entered judgment awarding insured an additional $20,000 for loss of contents, but did not award any recovery for business interruption loss and refused to assess interest on amount which insurer paid into court after insurer acknowledged that it was liable for such amount, and insured appealed. The Superior Court, No. 438 April Term, 1979, Price, J., held that: (1) evidence support finding that insured's operation could not have continued as a viable business enterprise and, thus, that no business interruption loss was suffered by insured as result of the fire, but (2) insured was entitled to interest on the amount of insurer's acknowledged liability from 60 days after proof of loss was submitted until such amount was placed in interest bearing account with court.

Judgment modified.

1. Insurance—507

Generally, busines interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened.

2. Insurance—507

In assessing liability against insurer for business interruption loss after a fire, previous experience of business before the fire as well as its probable future experience thereafter must be considered, and as prerequisite to recovery, claimant must show an actual monetary loss.

3. Appeal and Error—1009(7)

Findings of fact of a trial judge, sitting without a jury, sustained by the court en banc, have force and effect of a jury's verdict, and, if based on sufficient evidence, will not be disturbed on appeal.

4. Insurance—508.1(3)

In insured's action to recover casualty losses from insurer after building used in insured's motel and restaurant business was partially destroyed by fire, evidence supported finding that insured's operation could not have continued as a viable business enterprise, and, thus, that no business interruption loss was suffered by insured as result of the fire.

5. Interest—39(1)

Generally, if fire policy provides that loss is payable 60 days after proof of loss is received by insurer, interest on the amount payable doe snot start to run until the 60-day period has expired, but if insurer denies liability in toto, it is not entitled to the 60-day period allowed for adjustment of the loss and interest is recoverable from the date of the fire.

6. Interest —46(1), 49

Insured under fire policy, which provided that loss would be payable 60 days after proof of loss was received by insurer,

was entitled to interest on the amount, which was the insurer's acknowledged liability for loss sustained by insured due to fire, from 60 days after proof of loss was submitted until such amount was placed in interest bearing account with court.

7. Appeal and Error—1151(3)

Superior Court has authority to mold a verdict by adding interest.

John W. English, Sr., Erie, for appellant.

John M. McLaughlin, Erie, for appellees.

Before PRICE, CAVANAUGH and WATKINS, JJ.

PRICE, Judge:

This case arises from a casualty loss sustained by appellant on December 9, 1973, when a building it owned was partially destroyed by fire. At the time of the fire, appellant maintained an insurance policy with appellee Centennial Insurance Company (hereinafter Centennial) which provided coverage of $180,000 for building loss, $40,000 for loss of contents, and $60,000 for business interruption loss. After attempts to reach a total settlement of its claim proved unsuccessful, appellant filed a suit against Centennial contending that the insurance company was contractually liable for the following casualty losses: $148,865.27[1] for building loss; $70,000 for loss of contents; and $60,000 for business interruption loss. Prior to the date the complaint was filed, Centennial paid into the court of

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[1]Although appellant alleged a building loss of $148,865.27, the trial court awarded no building damage loss in excess of the $141,220 amount paid into the court by Centennial in December of 1974. Apparently, this latter amount represents a previous settlement agreed to by appellant and Centennial, under which appellant reserved the right to litigate its claim for business interruption loss and additional contents coverage. In any event, appellant did not take exception to the trial court's disposition regarding the amount of building loss endured, nor does it dispute that amount on appeal.

common pleas an amount of $181,220, which was designated as a payment of $141,220 for building loss and $40,000 for loss of contents. Centennial's liability on this amount was not contested. The issues in dispute before the court of common pleas were whether: (1) an oral binder existed providing for an additional $30,000 on the contents of the building;[2] (2) appellant sustained a loss of $60,000 from business interruption; and (3) interest on appellant's claims should be assessed from the date of the fire. A non-jury trial was held before the Honorable Lindley R. McClelland, and it was found that Centennial, through its agent, appellee MacEwen, entered into an oral binder with appellant to provide an additional $20,000 coverage for the contents of the insured building. The court, therefore, awarded appellant an additional $20,000 above the amount previously paid into court by Centennial, with interest on the $20,000 assessed at a rate of six percent per annum calculated from the date of the fire. Additionally, the court found that appellant failed to establish any business interruption loss or even prove that it could have survived financially absent the fire, and the court refused to assess interest on the $181,220 amount appellee paid into the court in 1974. Appellant filed exceptions to the trial court's findings and decision, and the court of common pleas, en banc, denied those exceptions.

On appeal, appellant contends that the trial court erred in finding that it had failed to establish a business interruption loss and in refusing to assess interest on the $181,220 amount from the date of the fire until the date Centennial paid it into the court of common pleas. Although we affirm the judgment

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[2]Appellant also named as defendants Centennial's agents Wesley Herbol, Abner McMaster and Evan MacEwen as individuals and doing business as Herbol, McMaster and MacEwen Insurance Agency, and alleged that in the event Centennial was absolved of liability on the alleged policy for additional contents coverage, its agents would be liable for failing to secure the additional coverage requested by appellant.

of the court of common pleas, we do agree with appellant that interest should have been assessed on the amount Centennial paid into the court, and we therefore modify the judgment by adding interest at the rate of six per cent per annum on the amount of $181,220 for the period of October 21, 1974, through December 16, 1974.

[1,2] Generally, business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened. *See* 44 C.J.S. Insurance §48; Annot. 83 A.L.R.2d 885; *Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co.*, 475 F.Supp. 586 (W.D.Pa. 1979); *Supermarkets Operating Co. v. Arkwright Mutual Insurance Co.*, 257 F.Supp. 273 (E.D.Pa. 1966). In assessing liability for a business interruption loss, the previous experience of the business before the fire as well as its probable future experience thereafter must be considered, and as a prerequisite to recovery, the claimant must show an actual monetary loss. *See generally*, Couch on Insurance 2d §§79:365, 79:520 (2d ed. 1959).

[3,4] We note, initially, that it is axiomatic in the law of this Commonwealth that the findings of fact of a trial judge, sitting without a jury, sustained by the court en banc, have the force and effect of a jury's verdict, and, if based on sufficient evidence, will not be disturbed on appeal. *See, e.g., Penneys v. Pennsylvania Railroad Co.*, 408 Pa. 276, 183 A.2d 544 (1962). Viewing the evidence in the light most favorable to Centennial, the record in the instant case indicates that appellant's business was doomed to failure absent an immediate infusion of additional financial backing. The motel and restaurant business appellant operated on the insured premises sustained operating losses in its first two years of operation and it was projected that it would sustain a net operating loss during the business year in which the fire occurred. Accounting records introduced into evidence revealed that appellant's ratio of assets to liabili-

ties was 1:4 at the end of fiscal year 1972 and approximately 1:5 at the end of fiscal year 1973. Expert testimony indicated that in a viable business enterprise, the ratio of assets to liabilities generally would be 2:1 and that the progessively deficient ratio displayed by appellant could only lead to financial ruin absent additional financing. Furthermore, officers of Marine Bank, the bank with which appellant maintained its payroll account, attested to appellant's financial plight. Two days prior to the fire, Marine Bank sent a letter to appellant to notify it that as a result of numerous overdrafts, appellant's payroll checking account was being terminated, and previous testimony disclosed that appellant's financial predicament made prospects of obtaining additional financing in the form of a $350,000 loan from Marine Bank bleak. We hold that the record adequately supports the trial court's finding that appellant's operation could not have continued as a viable business enterprise. The record, taken as a whole, depicts an establishment floundering with no apparent rescue in sight. Under these circumstances, the trial court was correct in concluding that no business interruption loss was endured by appellant as a result of the fire.

Although we affirm the judgment of the court of common pleas, we are compelled to modify it with respect to interest. In its opinion in support of judgment, the trial court stated "On the money paid into Court [*i.e.*, the $181,220 paid into court by Centennial on December 16, 1974], several problems arose concerning it so it would be unfair to award interest to plaintiff for that money." We find that trial court misapplied the law in denying interest on the $181,220 amount.

[5] The policy of fire insurance in the instant case provided that the loss would be payable sixty days after proof of loss was received by the insurance company. Both this court and our supreme court have stated that when such policies are in force, interest on the amount payable shall not start to run until the

sixty-day period has expired. *See Gardner v. Freystown Mutual Fire Insurance Co.*, 350 Pa. 1, 37 A.2d 535 (1944); *Samuels v. California Insurance Co.*, 192 Pa. Super. 484, 162 A.2d 48 (1960); *J. Purdy Cope Hotels Co. v. Fidelity—Phenix Fire Insurance Co.*, 126 Pa. Super. 260, 191 A.636 (1937). However, if the insurance company denies liability in toto, it is not entitled to the sixty-day period allowed for adjustment of the loss, and interest is recoverable from the date of the fire. *Gardner v. Freystown Mutual Fire Insurance Co., supra; Samuels v. California Insurance Co., supra.*

[6] In the case *sub judice*, appellant submitted proof of loss to Centennial on August 22, 1974. Therefore, under the terms of the policy, the loss became "payable" and thus interest began to run on October 21, 1974, absent a complete denial of liability by Centennial. The record does not disclose such a denial by Centennial. Although it consistently denied liability for business interruption loss and the existence of an oral binder for additional coverage for contents loss, Centennial acknowledged liability of $141,220 for the loss of the building and $40,000 for the original coverage for loss of contents. In accordance with this posture, it deposited $181,220 into the court of common pleas on December 16, 1974, and the sum was placed in an interest bearing account. Additionally, Centennial did not contest liability for that amount during trial.

Because Centennial did not deny liability for the $181,220 amount, interest on that sum commenced on October 21, 1974.[3] We hold, therefore, that appellant was entitled to interest on the $181,220 amount from October 21, 1974, until the date upon which the funds were placed in an interest bearing account with the court.

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[3]Conversely, since Centennial did deny liability for the additional contents coverage provided for in the oral binder entered into by agent MacEwen, the trial court was correct in assessing interest on that $20,000 amount from the date of the fire.

[7] We have authority to mold the verdict by adding interest. *See Peyton v. Margiotti,* 398 Pa. 86, 156 A.2d 865 (1959); *Gold & Company, Inc. v. Northeast Theater Corporation et al.,* ____ *Pa. Super.*____, 421 A.2d 1151 (1980); *Samuels v. California Insurance Co., supra.* Accordingly, we mold the verdict to provide for interest to appellant on the $181,220 sum at the rate of six per cent per annum calculated from October 21, 1974, to December 16, 1974.

The judgment is modified by adding interest as aforesaid.

NO. 1571

Office-Supreme Court, U.S.
FILED
APR 17 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EASTERN ASSOCIATED COAL CORP.,
Plaintiff-Petitioner,

v.

AETNA CASUALTY & SURETY COMPANY; AMERICAN HOME ASSURANCE COMPANY; HIGHLANDS INSURANCE COMPANY; FIRST STATE INSURANCE COMPANY; LEONARD RONALD HAYWARD and all other Underwriters at Lloyds subscribing to policy #2080712; EXCESS INSURANCE COMPANY, LTD.; INDEMNITY GUARANTEE ASSURANCE LTD.; LONDON & EDINBURGH INSURANCE COMPANY, LTD.; YASUDA FIRE & MARINE INSURANCE LTD.; NICHIDO FIRE & MARINE INSURANCE CO., LTD.; TUREGUM INSURANCE CO., LTD.; and BALOISE INSURANCE CO.,
Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented

1. In a diversity case, is a court of appeals bound to reconsider and reverse its prior decision, which had reversed the district court, solely because a decision of a state appellate court cited the district court's decision, when:

(a) the state court decision cited the district court for a general and uncontested proposition of law;

(b) the proposition for which the district court was cited is not inconsistent with the court of appeals opinion;

(c) the state court controversy did not involve any of the issues litigated in the district court case;

(d) the state court's citation of the district court was *dictum;* and

(e) the state court was an intermediate appellate court?

2. Is the construction of the terms of a contract by the court a denial of the right to trial by jury?

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Rule Cited

Supreme Court Rule:

17 10

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The respondents respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Third Circuit's opinion in this case. That opinion is recorded at 632 F.2d 1068.

Statement of the Case

Petitioner, Eastern Associated Coal Corp. ("Eastern"), commenced this action to recover under business interruption insurance policies. Eastern's claim included its loss of earnings less the amount of normal expenses which were not incurred during the interruption. In addition, it sought to recover for expenses it incurred to satisfy a long term coal supply contract during the period. Respondents admitted coverage for Eastern's reduction in earnings less its unincurred expenses and offered to pay that sum but contested liability for the expense of fulfilling the long term contract (hereinafter "contract expense").

In the trial court, respondents moved for summary that they were not liable for the contract expense. The motion was denied, the court holding that the issue of coverage was a question for the jury. At trial respondents again moved for judgment as a matter of law based on the same proposition. The court refused so to rule and submitted all questions of coverage to the jury. A verdict was returned which included the contested element of the claim. Respondents moved for judgment notwithstanding the verdict on the ground *inter alia* that there was no coverage for the contract expense. The motion, insofar as it related to said issue, was denied.*

Respondents took timely appeal from the final judgment to the Court of Appeals for the Third Circuit. In a comprehensive unanimous opinion, the court held that

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* Respondents' motion also involved the contention that one portion of the claim was not established by the evidence and constituted surprise. That part of the motion was granted and the court reduced the judgment accordingly. Eastern does not seek review of that ruling.

the insurers were liable only for Eastern's loss of earnings less unincurred expenses and not for the contract expense. Eastern petitioned for rehearing with a suggestion for rehearing *en banc*. The petition was denied. Thereafter Eastern moved for leave to file a petition to recall the mandate and a petition for reconsideration of its petition for rehearing with a suggestion for rehearing *en banc*. The motions for leave to file were granted as was petitioner's motion to file a petition with excess pagination. The Court did not grant leave with respect to hearing *en banc*. The petitions to recall the mandate and for reconsideration of the petition for rehearing were based on the contention that the Third Circuit's original decision was inconsistent with the decision in *Berkeley Inn, Inc.* v. *Centennial Ins. Co.*, 422 A.2d 1078 (Pa. Super. 1980). The panel which had heard the appeal considered the petitions and thereafter denied them.

REASONS FOR DENYING THE WRIT

I

There is no inconsistency between the state cases cited by petitioner and the decision below which would give rise to the Question Presented in the petition.

The Question Presented in the petition is whether in a diversity case a Court of Appeals is bound to follow and apply the principles enunciated in a state appellate court decision. Petitioner argues that the Third Circuit failed to follow the substantive law of the Commonwealth of Pennsylvania in two regards:

1. It did not reverse its original decision in view of the holding in *Berkeley Inn Inc.* v. *Centennial Insurance Co., supra,* and

2. It construed the insurance policies at issue as a matter of law.

A review of the opinion in *Berkeley Inn* and the other cases cited in support of Eastern's contentions does not bear out petitioner's claim that the decision below was incorrect.

The petition states (p. 11) that in *Berkeley Inn* "the Pennsylvania Superior Court put its stamp of approval on the District Court's analysis of Pennsylvania law in the instant case by citing that very decision." In fact, that court did not even mention the district court's analysis. The only reference in *Berkeley Inn* to this case is as follows:

> "Generally, business interruption insurance is intended to return to the insured the amount of profit it would have earned had the event insured against not intervened. See 44 C.J.S. Insurance §48; Annot. 83 A.L.R. 2d 885; Eastern Associated Coal Corp. v. Aetna Casualty & Surety Co., 475 F.Supp. 586 (W.D. Pa. 1979); Supermarkets Operating Co. v. Arkwright Mutual Insurance Co., 257 F.Supp. 273 (E.D. Pa. 1966)." 422 A.2d at 1080.

The proposition stated above is not novel. Indeed, the court of appeals opinion herein referred to "the generally accepted statement that business interruption insurance 'is designed to do for the insured in the event of business interruption caused by fire just what the business itself would have done if no interruption had occurred . . .' *National Union Fire Ins. Co.* v. *Anderson-Pritchard Oil Corp.*, 141 F.2d 443 (10th Cir. 1944)." 632 F.2d at 1079.

Petitioner attempts to extend the *Berkeley Inn* court's reference beyond the limited principle for which it is cited. It suggests that the Superior Court approved every aspect

of the district court's reasoning. Yet the issues involved in this matter and the issues in *Berkeley* were entirely different. That case concerned no more than whether the lower court sitting as a trier of fact was correct in its determination that an insured sustained no business interruption loss. The trial judge's conclusion, based on his factual findings, was affirmed by the appellate court in an opinion that is devoid of reference to matters similar to those here in issue. *Berkeley* involved no claim for any contract expense and no question that otherwise bears any relationship to the issues presented by this case.

The principles set forth in *Berkeley Inn* do not conflict with the court of appeals' analysis (632 F.2d at 1078, Note 16) showing a gross covered loss of $5,287,277 which included a projected net profit of $2,856,096. With respect to the two additional elements of the claim, described by Eastern as brokerage and substitute coal expense, the court of appeals found that the language providing insurance coverage made no provision therefor. The court described these as "new expenses."

In *National Surety Corporation* v. *Midland Bank,* 551 F.2d 21 (3rd Cir. 1977) the court dealt with an argument not dissimilar to what Eastern advances based on *Berkeley Inn.* In that case the Third Circuit reversed the district court after concluding that it was not bound by *dictum* enunciated by an intermediate state appellate court. If further stated that even if the relevant discussion in the state court opinion were not *dictum,* it would not be binding since it was rendered by an intermediate appellate court of the state. It is also significant that the state court decision on which the appellant had relied in *National Surety* had cited with approval the district court's decision in *National Surety.* The court of appeals concluded that the mere citation of the district court decision did not constitute adoption of the opinion.

Eastern also refers this Court to *Nusbaum* v. *Hartford Fire Ins. Co.*, 276 Pa. 526, 120 A 481 (1923) and *Nusbaum* v. *Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926) as authority for its contention that construction of respondents' insurance policies was a matter for the jury.* Both cases were cited in the court of appeals and received comprehensive analysis and treatment in its opinion. *Nusbaum II* was readily distinguished by the court as follows:

> "In *Nusbaum II* the court found no error in the jury's determination of the cause of the insured's loss or calculation of the insured's damages. Eastern argues that *Nusbaum II* stands for the proposition that 'it is for the jury to determine the measure of damages.' (Reply Brief for Appellant-Cross-Appellee at 14). Indeed, *Nusbaum II* permits a jury to determine the value of each element in an insurance policy's formula for recovery. However, the formula for recovery is not a jury question, but a question of law for the judge to determine from the language of the policy." 632 F.2d 1076.

Nusbaum I is equally supportive of respondents' position in that the state court expressly disallowed certain damages awarded by the jury. In describing the items on which testimony had improperly been permitted at trial, the court said:

> "Allowances for none of these could be made under the policy." *Nusbaum* v. *Hartford Fire Insurance Company*, 276 Pa. at 534.

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* The court of appeals opinion herein referred to these cases respectively as *Nusbaum I* and *Nusbaum II*. Such references are retained in this brief.

The decision in *Supermarkets Operating Co.* v. *Arkwright Mutual Ins. Co.*, 257 F.Supp. 273 (E.D. Pa. 1966) cited in Eastern's petition was also before the court of appeals and was disposed of in its opinion (632 F.2d at 1079, Note 17). The court found "Eastern's reliance . . . misplaced" and further pointed out that "[t]he case did not address the question of new expenses."

In addition to arguing that the meaning of respondents' policies was an issue to be submitted to the jury, petitioner contends that the Third Circuit improperly failed to apply what it claims to be the Pennsylvania rule that insurance policies are to be construed in favor of the insured. It is submitted that the court's holding did not reject any accepted principle of construction. The rule enunciated in the cases referred to in the petition is that ambiguous terms in an insurance policy are to be construed against the insurer who prepared that policy. The decision below approved this proposition. The court added, however, that Eastern's policy forms were selected by its representative and were sent to the insurers for execution. Citing the general proposition (in Pennsylvania and elsewhere) that conflicts over the interpretation of ambiguous terms in a contract are to be resolved against the author, the court then said:

> "At a minimum, the above cited cases require that we not construe the language against the defendants." 632 F.2d at 1075.

Whether or not this reasoning is valid and supportable is academic since, as is clear from the opinion, the court found the policies unambiguous:

> "We agree with the insurers and find this language unambiguous. For this reason, the rule that contracts are construed strictly against the insurer cannot apply. *Penn-Air, Inc.* v. *Indemnity Ins. Co. of N.A.*, 439 Pa. 511, 517, 269 A.2d 19, 22 (1970); *Pat-*

> *ton* v. *Patton,* 413 Pa. 566, 573, 198 A.2d 578, 582 (1964); *Miller* v. *Prudential Ins.*, 239 Pa. Super. 467, 472, 362 A.2d 1017, 1020 (1976)." 632 F.2d at 1077.

Thus, the court did not construe the policy in any party's favor, and its holding did not turn on any rule of construction which petitioner claims was improperly applied.

II

The Court of Appeals' construction of respondents' insurance policies as a matter of law did not infringe upon Eastern's right to trial by jury.

Eastern's contention that it has been denied its right to trial by jury must be based on the view that one is entitled to have a jury construe an unambiguous contract. The law is clearly to the contrary. The courts of Pennsylvania follow the unvarying rule that the construction of unambiguous contracts is a matter of law for the court. *Adelman* v. *State Farm Mutual Auto Ins. Co.,* 255 Pa. Super. 16, 386 A.2d 535 (1978); *Blocker* v. *Aetna Cas. & Sur. Co.,* 232 Pa. Super. 111, 332 A.2d 476 (1975). Determination of a question of law by the court does not violate the constitutional right to trial by jury. *Baltimore & Carolina Line, Inc.* v. *Redman,* 295 U.S. 654, 55 Sup. Ct. 890 (1935).

Petitioner's argument does not really involve a question of the right to trial by jury at all; rather, it begs the basic question of whether the court of appeals was correct in finding the contract terms unambiguous and interpreting them as a matter of law. There is ample support for its actions in that regard; see discussion herein at page 6 of *Nusbaum I, Nusbaum II;* and *Adelman* v. *State Farm Mutual Auto. Ins. Co.,* 255 Pa. Super. 116, 123,

386 A.2d 535, 538 (1978); *Blocker* v. *Aetna Cas. & Sur. Co.*, 232 Pa. Super. 111, 114, 332 A.2d 476, 477-478 (1975); both cited by the Court of Appeals at 1077 of 632 F.2d.

POINT III

The Issues herein do not warrant consideration by this Court.

The issues at bar were resolved by the court of appeals in conformity with generally accepted legal principles and with the law of the Commonwealth of Pennsylvania. Petitioner's contention that the Third Circuit did not follow the state law is not borne out by a reading of the cases cited. Not only is *Berkeley Inn* distinguishable on the facts from the instant controversy but it also enunciates propositions of law which are entirely consistent with the decision below.

An examination of the Third Circuit's decision in terms of its ramifications for other litigants indicates that there will be no change in the treatment of controversies and no effect on other actions. The decision approves the propositions that insurance contracts which are ambiguous are to be construed against the insurer who prepared them; that ambiguous contracts are generally to be construed against their author; and that where a contract is not ambiguous it is to be construed by the court as a matter of law. Although Eastern's petition for a writ of certiorari seeks to demonstrate weighty issues concerning trial by jury and the effect of The Rules of Decision Act, this controversy does not involve either of the foregoing. Rather, it concerns the propriety of the court's construction of Eastern's business interruption insurance policies, a matter which has been three times before the Third Circuit.

Rule 17 of the Supreme Court Rules states that review "will be granted only when there are special and important reasons therefor." Eastern's petition does not demonstrate reasons that are either special or important.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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Defendants-Respondents.

Reply Brief To Respondents' Brief In Opposition To Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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I. THE COURT OF APPEALS FAILED TO ACCORD PROPER WEIGHT TO THE DISTRICT COURT'S DETERMINATION OF PENNSYLVANIA LAW

Defendant-Respondent Insurers ("Insurers") at page 2 of their brief claim that the District Court held that, "The issue of coverage was a question for the jury" and that, the District Court "...submitted all questions of coverage to the jury." when that is not the fact. The Insurers have not specified a record reference in support of their statements because the record is to the contrary. In the District Court's post-trial opinion beginning at the bottom of page B-6*, the Court stated:

> "As is noted, this case is really not a controversy over liability but rather a controversy over the amount of plaintiff's damages and it was held this amount had to be determined by the jury".

The District Court went on to state at B-10:

> "It was further pointed out that the question before the jury was whether they believed plaintiff's testimony and they could find that the purchases were not necessary or the prices alleged were not correct. But if they found that they were, they would be entitled to consider this as covered by the policy, ..."

And, at B-11:

> "...The jury was clearly instructed that if they believed plaintiff's testimony in this respect, they would be entitled to consider these losses on purchases of brokerage coal and substitute coal as covered by the policy. ..."

Thus, it is believed appropriate to note that important statements of the Insurers in opposition to the Petition are contrary to the record.

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*References are to the Appendices to Eastern's Petition for Writ of *Certiorari*.

As the District Court indicated (B-8), its submission to the jury was in accord with *Nusbaum v. Hartford Fire Ins. Co.*, 285 Pa. 332, 132 A. 177 (1926), and that decision has not been overruled or distinguished by a Pennsylvania appellate court.

In reviewing the District Court's determination of the law of Pennsylvania, the Court of Appeals was duty-bound to give that determination great weight and not to adopt a contrary view unless convinced of error. *Rios v. Cessna Financial Corporation*, 488 F.2d 25 (10th Cir. 1973); *McCallister v. M-A-C Finance Co. of Tulsa, Inc.*, 332 F.2d 633 (10th Cir. 1964); *Weiser v. Otter Tail Power Co.*, 318 F.2d 375 (8th Cir. 1963); *Illinois Central Railroad Company v. Stufflebean*, 270 F.2d 801 (8th Cir. 1959); *Citrigno v. Williams*, 255 F.2d 675 (9th Cir. 1958); *Frank B. Connet Lumber Co. v. New Amsterdam Cas. Co.*, 236 F.2d 117 (8th Cir. 1956); *Madison County Farmers' Asso. v. American Employers' Inc. Co.*, 209 F.2d 581 (8th Cir. 1954).

Even in situations where the state's law is unsettled, the Court of Appeals should uphold the District Court's determination if that court reached a *permissible conclusion. Western Casualty & Surety Co. v. Herman*, 318 F.2d 50 (8th Cir. 1963); *Weiser v. Otter Tail Power Co., supra.*

Thus, it is only in very limited circumstances that the Court of Appeals should substitute its opinion for the determination of the District Court.

Here, the Court of Appeals failed to concede the respect due the District Court's determination of Pennsylvania law and that the District Court's determination was correct is clearly supported by *Berkeley Inn, Inc. v. Centennial Ins. Co.*, 422 A.2d 1078 (Pa. Super. 1980), which came down four days prior to the reversal of the District Court by the Court of Appeals. The Insurers contend that the "issues in *Berkeley* were entirely different" (p. 5) and that "*Berkeley* involved no claim for any contract expense and no question that otherwise

bears any relationship to the issue presented by this case" (p. 5), but the decision is to the contrary.

The issue in *Berkeley* was exactly the same as here—what loss, if any, did the business sustain? The Pennsylvania Superior Court's reference to the evidence beginning at D-5, continuing in D-6, refutes the Insurers' argument that the case bears no relationship. The admissible evidence recited by the Superior Court and the conclusions are not limited by the policy formula, but to the contrary, the evidence of every aspect of the business operations are admissible and go to the basic issue of what loss, if any, did the business sustain, taking *all* things into consideration. This is the same as Eastern. This is in keeping with the basic principle that such policies are intended to return to the insured the amount of profit it would have earned had the event insured against not intervened.

The only conclusion that can fairly be drawn from *Berkeley* is the application of *Nusbaum,* that the theories of business damage of the two parties are submitted to the jury and from those theories and the evidence, damages are determined. Moreover, *Berkeley* follows the decision in Eastern, contrary to the contention of the Insurers.

Here, the Court of Appeals invaded the province of the jury and deprived Eastern of its right to a jury trial by constituting itself an expert witness as to what *damages* Eastern sustained. The Court of Appeals reached this result by declaring that the policy was unambiguous and that, since the Court of Appeals could not find precise language in the policy supporting Eastern's theory of damages, it would not permit the award of damages even though the policy contained no exclusion of those items. Subconsciously or otherwise, in reality, the Court of Appeals constituted itself an expert witness for the Insurers to espouse the Insurers' theory that Eastern had not sustained a business loss from the fire and the Court of Appeals resolved a purely factual issue properly for the jury.

But without regard to whether the Court of Appeals was correct in its conclusion that the insurance policy is clear and unambiguous (with which another court has disagreed*), the Court of Appeals ignored the holding of the Pennsylvania Supreme Court in *Brakeman v. Potomac Insurance Co.*, 472 Pa. 66, 72, 371 A.2d 193 (1977) that even in such cases there is much more to consider. In the *Brakeman* case, the Pennsylvania Supreme Court overturned its longstanding prior decisions and established as a basic principle of Pennsylvania insurance law that even clear and unambiguous language in an insurance policy is not controlling—a matter which the Court of Appeals refused to consider.

Thus, the Court of Appeals is incorrect on all grounds and the decision tainted with a clear anti-consumer attitude repudiated by the Supreme Court of Pennsylvania. In *Collister v. Nationwide Life Ins. Co.*, 479 Pa. 579, 388 A.2d 1346 (1978), *cert. denied,* 439 U.S. 1089 (1979), the Supreme Court stated:

> "Courts should be concerned with assuring that the insurance purchasing public's reasonable expectations are fulfilled. Thus, *regardless of the ambiguity, or lack thereof,* inherent in a given set of insurance documents (whether they be applications, conditional receipts, riders, policies, or whatever), the public has a right to expect that they will receive something of comparable value in return for the premium paid." (Emphasis added.) 479 Pa. at 594.

Collister confirms the correctness of the District Court's determination as cited and applied by the Pennsylvania Superior Court in *Berkeley* that the basic principle is that insurance policies are intended to return to the insured compensation for the loss resulting from the event insured against, in this case, necessary expenses and loss of profits.

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*In *Supermarkets Operating Co. v. Arkwright Mutual Insurance Co.*, 257 F. Supp. 273, 276 (E.D. Pa. 1966), examining the same policy the Court stated; "[a]nd an examination of the policy indicates that there is an ambiguity ...."

The cases cited by the Insurers under II, at pages 8, 9 are either before *Brakeman* and *Collister* or readily distinguishable. Not one involves a business interruption policy loss and not one is contrary to *Brakeman* and *Collister* that even clear and unambiguous policies need not be enforced.

II. SPECIAL AND IMPORTANT REASONS FOR REVIEW ARE PRESENT

The Insurers imply that the Court of Appeals considered Eastern's Petition for Reconsideration of Petition for Rehearing With Suggestion for Rehearing En Banc on the merits, but that is far from clear. Following the grant by this Court of an extension of time to seek *certiorari,* Eastern returned to the Court of Appeals and filed a Petition for Reconsideration of Petition for Rehearing With Suggestion for Rehearing En Banc and a Petition to Recall the judgment issued in lieu of a mandate. The latter Petition was filed because no procedural rule granted Eastern the right to file the Petition for Reconsideration and Eastern believed that without first recalling its mandate the Court of Appeals was without apparent authority to consider the Petition for Reconsideration on its merits. Eastern hoped that the Court of Appeals would recall its mandate, but it did not. It is unclear just what consideration was given to Eastern's Petition for Reconsideration, as the Court of Appeals panel handled the papers and remained silent. Since the panel declined to recall the mandate, the question remains: Did the panel decline the Petition for Reconsideration for lack of jurisdiction?

To further illustrate the uncertainty of the consideration given to this matter, it clearly appears that the panel declined to even circulate the petition to the other members of the Court for their consideration for the highly technical reason that the Petition was "untimely". Was this in keeping with fundamental concepts of fair play under the circumstances since the Petition was not filed under the rule upon which the panel relied? The

Berkeley Inn decision was not known to Eastern until long after the time provided to Petition for Rehearing. Was the panel aware of the decision? In complete fairness, should not the entire Court have had the opportunity to decide whether rehearing should have been granted?

III. CONCLUSION

The Court of Appeals has breached its duty to give appropriate respect to the District Court's determination of the law of Pennsylvania with regard to Eastern's right to trial by jury. The one-sentence footnote statement of the panel's reasoning (Footnote 12, A-14) is far less than adequate to justifiably deny a jury trial without any Pennsylvania authority to support the panel's decision and is clearly erroneous. When *Berkeley Inn* was called to the panel's attention, the minimum standards of fair play and justice required a complete rehearing before the Court En Banc regardless of the absence of a procedural rule.

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